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OF THE

LAWS OF ENGLAND

VOLUME VI

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ENCYCLOPÆDIA

OF THE

LAWS OF ENGLAND

BEING A

NEW ABRIDGMENT

BY THE

MOST EMINENT LEGAL AUTHORITIES

UNDER THE GENERAL EDITORSHIP OF

A. WOOD RENTON, M.A., LL.B.

OF GRAY'S INN, AND OF THE OXFORD CIRCUIT, BARRISTER-AT-LAW

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VOLUME VI

FREIGHT TO *INTERMENT*

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ENCYCLOPÆDIA

OF

THE LAWS OF ENGLAND

Freight.

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1. *What Freight is.*—The word "freight" means the reward payable to a shipowner for the safe carriage and delivery of the goods carried in his ship. The term is also (perhaps improperly) applied to the hire paid for the use of a ship for a voyage or period of time. It does not, in the absence of usage, include "passage-money" or money paid for carrying persons as opposed to goods (*Lewis* v. *Marshall*, 1844, 7 Man. & G. 729, charter-party; *Denoon* v. *Home and Colonial I. C.*, 1872, L. R. 7 C. P. 341, marine policy); and no freight is payable for a child born in the course of a voyage (Abbott, 277 (5th)). In a marine policy it means "the benefit derived from the employment of a ship, whether received by a money payment from one person who charters the whole ship, or from various persons who put specific quantities of goods on board, or from persons who pay the shipowner the value of his own goods at the port of delivery increased by their carriage in his ship" (Lord Tenterden, *Flint* v. *Flemyng*, 1836, 1 Barn. & Adol. 45). See AFFREIGHTMENT; MARINE INSURANCE.

The word, however, may not have its proper meaning in a contract of sea carriage; *e.g.* in a *c. f. i.* contract (*q.v.*), relating to the goods which are being carried in the vendor's ship at a nominal rate, a proportion of the inclusive price may be specified as "freight" which corresponds to the current price at which they would be carried in another person's ship (*Keith* v. *Burrows*, 1877, 2 App. Cas. 650). Where goods are carried in a ship of their owner no freight is really payable, but a rate may be specified in order to allow their owner to negotiate it with other persons, and thus assignees of the freight of a ship on goods deliverable under their bills of lading to the order of the shippers (shipowners' agents) were held entitled to hold the goods for that freight (*Wegnelin* v. *Cellier*, 1873, L. R. 6 H. L. 286). A shipowner has also been held entitled to exercise an unpaid vendor's lien over goods sold by him and carried in his ship for the balance of their price which was apportioned to freight (*Swan* v. *Barber*, 1879, 5 Ex. D. 130).

Freight is part of the *res* available in collision and salvage, and contributes in general average (see those heads). It is no longer the "mother of wages," *i.e.* the wages of the crew do not depend on freight being earned (M. S. A., 1894, s. 157 (1); see WAGES).

2. *Time of Payment.*—Freight may be payable either on delivery of the goods, or wholly or partly in advance, or after delivery, or in any way that the parties choose to contract; and in the absence of express stipulation the time of payment may be determined by custom (*Browne* v. *Byrne*, 1854, 3 El. & Bl. 703). In the absence of either stipulation or custom, freight does not become payable till delivery of the goods, and the shipowner is not bound to part with the goods till his freight is paid. This is freight proper, or freight having all the legal incidents of freight.

"Freight (proper) is payable only on the safe carriage and delivery of the goods: if the goods are lost on the voyage nothing is payable; and in cases where the freight is made payable at so much per ton of the goods, a proportionate part of the freight only is payable" (Lord Blackburn, *Allison* v. *Bristol M. I. C.*, 1876, 1 App. Cas. 228). Under a charter-party or bill of lading stipulating for ordinary freight, it is a condition precedent to the recovery of anything as freight under the charter-party that the goods shall have been carried to the port of destination (Brett, L.J., *Metcalfe* v. *Britannia Iron Works Co.*, 1877, 2 Q. B. D. 430); though if the contract permit of it, *e.g.* "to [the named port], or so near thereunto as she may safely get," and there are justifying circumstances, delivery at another place will suffice (*ibid.*; *Cargo ex Argos*, 1873, L. R. 5 P. C. 134, 159). If the goods perish after the ship reaches her proper destination, but before delivery at that destination, no freight is payable (*Duthie* v. *Hilton*, 1868, L. R. 4 C. P. 138). If the freight be payable on delivery the consignee must pay it concurrently with the delivery of the goods (*Moller* v. *Young*, 1855, 24 L. J. Q. B. 217); and "on delivery" does not mean *after* delivery (*Paynter* v. *James*, 1867, L. R. 2 C. P. 348 and 357); and the consignee of the goods must generally tender the freight due upon delivery being made to him unless the master by his conduct or expressly waives the necessity for a tender (*The Norway*, 1864, B. & L. 226, 377, 409). The voyage on which the goods have been carried must have been lawful or no freight is due (*Muller* v. *Gernon*, 1811, 3 Taun. 394).

No freight is due when the completion of the voyage is prevented by causes within the control of the shipowner; or by causes beyond his control, whether physical (*Metcalfe* v. *Britannia Iron Works*, 1877, 2 Q. B. D. 423, port inaccessible owing to ice), political (*Castel* v. *Trechman*, 1884, 1 C. & E. 276, port blockaded), or due to the act of an enemy (*Liddard* v. *Lopes*, 1809, 10 East, 526; 10 R. R. 368, capture), or the act of the shipowner's own Government (*Osgood* v. *Groning*, 1810, 2 Camp. 466; 11 R. R. 765, blockade); and it makes no difference that the preventing cause is one excepted by the contract of affreightment from the shipowner's responsibility for the goods. Nor is freight due when the cargo is sold at an intermediate port, though that may have been necessary because of its damaged condition or in order to raise funds for repairing the ship (*Vlierboom* v. *Chapman*, 1844, 13 Mee. & W. 230; *Hopper* v. *Burness*, 1876, 1 C. P. D. 137; *Hill* v. *Wilson*, 1879, 4 *ibid.* 329); or when the cargo, though brought to the port of destination, does not arrive there *in specie*, *i.e.* "merchantable and the same thing as shipped" (*Asfar* v. *Blundell*, [1895] 1 Q. B. 123, rotten dates; *Duthie* v. *Hilton*, 1868, L. R. 4 C. P. 138, solidified cement). But if it arrives *in specie*, although damaged to such an extent as not to be worth the freight payable for its carriage, and the merchant abandons it to the

shipowner, and such damage be caused by the fault of the master and crew (*Dakin* v. *Oxley*, 1864, 15 C. B. N. S. 646, Willes, J.), freight is due, *e.g.* on bricks crushed by machinery in the hold (*Garrett* v. *Melhuish*, 1858, 4 Jur. N. S. 743). Freight is also payable where the completion of the voyage is prevented by the fault of the charterer or goods owner, although under the contract the completion of the voyage and delivery of the cargo at its destination are conditions precedent (*Cargo ex Galam*, 1863, B. & L. 167, 178; *Smith* v. *Wilson*, 1807, 8 East, 437; *The Soblomsten*, 1866, L. R. 1 Ad. & Ec. 293: *Blasco* v. *Fletcher*, 1863, 32 L. J. C. P. 384). It is also payable by captors of a neutral ship carrying belligerent cargo (*The Copenhagen*, 1799, 1 Rob. C. 289, 291); and where goods in a recaptured ship are unloaded by order of the Court, and the ship is thus prevented from carrying them on (*The Ranchorse*, 1800, 3 Rob. C. 101, 106 *n*); but captors get no freight from neutral goods in a condemned ship which have not been carried to their destination (*The Fortuna*, 1809, Edw. 56). No freight is payable if the ship is abandoned on the voyage and brought in by salvors, for the contract of affreightment is terminated by the abandonment (*The Cito*, 1881, 7 P. D. 5).

Under a contract, however, by which freight is only to be payable on delivery, partial freight or freight *pro rata itineris* may be claimed, although the voyage is not completed, provided that the owner of the goods voluntarily accepts delivery of them at an intermediate port and dispenses with their being carried to their original destination. And where the original destination has been changed by the goods owners, and by their orders they are delivered at a port short of the original one, full freight has been held payable (*Christy* v. *Row*, 1808, 1 Taun. 300; 9 R. R. 776). "To justify a claim for *pro rata* freight there must be a voluntary acceptance of the goods by their owner at the intermediate port in such a mode as to raise a fair inference that the further carriage of the goods is intentionally dispensed with" (Dr. Lushington, *The Soblomsten*, 1866, L. R. 1 Ad. & Ec. 297). For instances of *pro rata* freight being allowed, see *Luteridge* v. *Grey*, 1733, Abbott, 307 (5th); *The Copenhagen*, 1799, 1 Rob. C. 289; *Mitchell* v. *Darthez*, 1836, 2 Bing. N. C. 555, 570.

If, however, the goods are not voluntarily accepted by their owner at the intermediate port, no claim to *pro rata* freight arises; *e.g.* where goods are sold by the master at a port of refuge, whether justifiably or unjustifiably, to save their value or for the repairs of the ship, and an acceptance of their *proceeds* is immaterial (*Hunter* v. *Prinsep*, 1808, 10 East, 378; 10 R. R. 328, Lord Ellenborough; *Vlierboom* v. *Chapman*, 1844, 13 Mee. & W. 230, Parke, B.; *Hopper* v. *Burness*, 1876, 1 C. P. D. 137; *Hill* v. *Wilson*, 1879, 4 *ibid.* 329). The fact of the shipowner being prevented by *vis major* from carrying the goods to their destination does not entitle him to *pro rata* freight, unless there is a voluntary acceptance of them by their owner at an intermediate port (*Luke* v. *Lyde*, 1759, 2 Burr. 882; *Metcalfe* v. *Britannia I. W.*, 1877, 2 Q. B. D. 423; *Castel* v. *Trechman*, *ante*).

Instead of being payable on delivery, freight may be made payable (wholly or partly) in advance, and is then called *advance freight*, *e.g.* "on shipment," or "on sailing"; under such a stipulation the freight must be paid though the ship or cargo be lost before arriving at their destination (*Andrew* v. *Moorhouse*, 1814, 5 Taun. 435; 15 R. R. 544; *Byrne* v. *Schiller*, 1871, L. R. 6 Ex. 319). Where advance freight has been paid it cannot be recovered from the shipowner though the goods be lost (*De Silvale* v. *Kendall*, 1815, 4 M. & S. 37; *Saunders* v. *Drew*, 1832, 3 Barn. & Adol. 445); and the same rule applies to the case of a "through transit"; and in a case

where the transit of the goods was to be partly by steamer, partly by rail, and partly by steamer again, for which "freight is payable in advance, ship lost or not lost," and the goods were lost while on board the first steamer, the owner of that ship who had been paid in advance for the whole transit was held justified in paying over to the other carriers their proportion of that advance (*Greeves* v. *West India Co.*, 1875, 22 L. T. 615; and so *Ocean I. C.* v. *National S.S. Co.*, 1890, 7 T. L. R. 417). The contract determines whether the freight is to be paid independently of the goods being delivered or not, *e.g.* it may provide for advance freight being paid at port of loading, and yet the payment may be dependent on the safe delivery of the goods at their destination (*Mashiter* v. *Buller*, 1807, 1 Camp. 84); while, on the other hand, payment may be independent of the result of the voyage (*Andrew* v. *Moorhouse*, 1814, 5 Taun. 435; 15 R. R. 544, £5 a ton paid in London or £7 paid at the Cape, and charterer preferring former; and see *Lidgett* v. *Perrin*, 1861, 11 C. B. N. S. 362).

Advance freight is not payable if it is to be paid "on signing bills of lading," and the bills of lading are never signed, and the ship never sails (*Ex parte Nyholm*, 1873, 43 L. J. Bky. 21). But where under such a stipulation the vessel sails and is lost, charterers must present bills of lading for signature or be liable in damages to the amount of the advance freight (*Oriental S.S. Co.* v. *Tylor*, [1893] 2 Q. B. 518). If, however, freight is to be advanced "if required," "less interest and insurance," and the ship is lost immediately after sailing, and no bills of lading have been presented for signature and no demand for the advance freight has been made, the shipowner cannot require it to be paid after the loss, for the provision as to insurance shows that the requirement must be made while insurance is possible (*Smith* v. *Pyman*, [1891] 1 Q. B. 42 and 642).

Charter-parties, however, often provide for advances to be made by the charterer for ship's disbursements; and the difference between these and advance freight is that they are a loan repayable to the charterer in any event, while advance freight is irrecoverable. But they are at times difficult to distinguish; *e.g.* a charter-party saying the "captain is to be supplied with cash for ship's use" has been held to mean an advance only (*Manfield* v. *Maitland*, 1821, 4 Barn. & Ald. 882); while one saying that "cash was to be advanced at port of loading and the residue of such freight was to be paid on delivery of cargo at port of destination" has been held to mean advance freight (*De Silvale* v. *Kendall*, *ante*). A test of the nature of such advance is to see who is to insure it; for, as advances of freight are at charterers' or merchants' risk, insurance by them is a sign that the advance is of freight, *e.g.* cash for ship's disbursements to be advanced up to £300 free of interest, but subject to insurance and £2, 10s. per cent. commission (*Hicks* v. *Shield*, 1857, 26 L. J. Q. B. 205; and see *Allison* v. *Bristol M. I. C.*, 1876, 1 App. Cas. 229); and a stipulation that the "shipowner is to insure the amount of the freight to be advanced by freighter's acceptance at three months on signing bills of lading, and deposit with charterer the club policy and guarantee same," may have the same effect (*Tamvaco* v. *Simpson*, 1866, L. R. 1 C. P. 363).

The charterer may also be liable under his contract to pay freight in addition to an advance of freight, though the ship may be lost on the voyage; *e.g.* where the charter-party provided for an advance to the master by the freighter's agents in Calcutta against his receipt, and "to be deducted, together with 1¼ per cent. commission on the amount advanced and cost of insurance, from freight on settlement thereof, and remainder on right delivery of cargo at port of discharge in cash as customary, master to sign

bills of lading at any current rate of freight required without prejudice to the charter-party, but not under chartered rates except the difference is paid in cash," it was held that the shipowner was entitled to this difference besides the advance, although the ship was lost on the voyage (*Byrne* v. *Schiller*, 1871, L. R. 6 Ex. 319): and in another case the charterers were similarly held bound to make up the deficiency between the chartered and actually carried freights, although the ship was lost on the voyage (*Carr* v. *Wallachian Tel. Co.*, 1866, L. R. 1 C. P. 636 and 2 *ibid.* 468).

A clause in a charter-party that advance freight shall be payable "subject to insurance" only means subject to deduction of cost of insurance (Carver, 566), and does not oblige the shipowner to insure the advanced freight for the merchant's benefit (*Jackson* v. *Isaacson*, 1858, 3 H. & N. 405; *Watson* v. *Shankland*, 1873, L. R. 2 H. L. Sc. 304). The shipowner, in order to get the advance freight, thus pays for the risk of insuring it, and bears the risk; but this does not, however, relieve him from responsibility to the charterer for the loss of the advances, or the increased value of the goods by reason of those advances, if the cargo is lost by the negligence of the master or crew (*Rodocanachi* v. *Milburn*, 1886, 17 Q. B. D. 326 and 18 *ibid.* 67), and under similar circumstances the charterer can recover the advance freight, premiums of insurance, and other necessary shipping charges paid by him, though the contract makes the charterer liable to pay advance freight "ship lost or not lost" (*Great Indian Pen. R. C.* v. *Turnbull*, 1885, 1 T. L. R. 570); and in the like case the charterer has also been allowed to recover the advanced freight which he had insured for his underwriter's benefit as part of the value of the goods (*Defourcet* v. *Bishop*, 1886, 18 Q. B. D. 373).

Where freight is to be paid in advance the ship must sail in a seaworthy condition (*Thompson* v. *Gillespie*, 1855, 24 L. J. Q. B. 340, "one-fourth of freight to be advanced, less 5 per cent. for insurance, interest, and commission"). Where freight has partly been paid in advance, and the ship only arrives at her destination with part of her cargo, the way to ascertain the balance payable is to regard the payment made not as distributive over the whole cargo, but as paid for the part which has arrived. Thus in a case where the freight was to be paid "on unloading and right delivery of cargo at 42s. per ton, . . . and such freight is to be paid, say one-half in cash on signing bills of lading, less insurance interest and discount, and remainder on right delivery of cargo, agreeably to bills of lading, less cost of coal short delivered," and the shipowner insured the "freight payable abroad," and one-half of the freight was paid on shipment, and the ship only arrived with half her cargo, it was held to be a total loss under the policy, only half the freight being at risk (*Allison* v. *Bristol M. I. C.*, 1876, 1 App. Cas. 209). In such a charter it seems that the words "the amount paid on signing bills of lading to be deducted from freight in settlement thereof" should be implied if they are not expressed (Lord Selborne, *ibid.* 254), and *à fortiori* a lump sum paid for advance freight must be deducted in full on settlement of freight at port of discharge, though some of the cargo may have been lost on the voyage (Carver, 569).

Freight under a charter-party may be payable in a lump sum, called *lump freight*, on delivery of the cargo. If, in such a case, the voyage is not completed, and the cargo is not delivered, no freight is due; but if the ship arrives with only a part cargo, her claim to freight depends on the construction of the contract. Generally, however, the "cargo" delivered need not be that agreed to be loaded under the charter-party, nor the whole of that shipped; for although part of it have been lost, jettisoned, or

sold by the master (and this was made necessary by his negligence), the lump freight is still due, though the goods owner may have a counter-claim against the shipowner for such loss (*Merchant Shipping Co.* v. *Armitage*, 1873, L. R. 9 Q. B. 97; *The Norway*, *ante*). If the vessel fails to complete the voyage herself, and the cargo owner has to send on the goods, the lump freight is not due, but it seems that the shipowner can earn it if he transhipps the goods (*Mitchell* v. *Darthez*, 1836, 2 Bing. N. C. 555). Where a lump sum is made payable by the charter-party in case of default to bring home a return cargo, it is due to the shipowner, although the master earns freight on the return voyage by bringing home other persons' goods and his own (*Bell* v. *Pullar*, 1810, 2 Taun. 285; 11 R. R. 574). Under a contract to pay lump freight on delivery of cargo, and the master to sign bills of lading at any rate of freight if required, and freights to be collected by the charterer, the lump freight only becomes due when the cargo is completely delivered (*Brown* v. *Tanner*, 1868, L. R. 3 Ch. 597).

Freight under a charter-party may also be made payable for the hire of a ship for a particular period of time and in proportion to the time occupied, and is then called *time freight*. The terms of the charter-party determine when the freight becomes payable, and it may vest at certain intervals, *e.g.* 24s. per ton per month, two months' freight payable on signing charter-party, and two months' freight payable every four months, and the ship being lost in the eleventh month, the freight was held to vest monthly (*Havelock* v. *Geddes*, 1809, 10 East, 555; 10 R. R. 380); or "at a certain rate per ton per month, freight payable thus, as much as shall be earned at time of arrival of ship at first destined port abroad within ten days of arrival, and every month's freight afterwards to be payable monthly," ship being lost before reaching any port, no freight was held due (*Gibbon* v. *Mendez*, 1818, 2 Barn. & Ald. 7; 20 R. R. 337); or "at a certain rate per month for the voyage out and home," ship lost on her way home with cargo, outward freight held payable (*Mackrell* v. *Simond*, 1796, Abbott, 333 (5th)); or "freight to become due and be paid on final discharge of vessel," ship lost on outward voyage, no freight held payable (*Byrne* v. *Pattinson*, 1797, Abbott, 335 (5th)); or "a freight of £670 per month of round voyage to be payable on arrival and discharge of ship at her destined port in Great Britain," ship seized on outward voyage and brought back, no freight payable (*Smith* v. *Wilson*, 1807, 8 East, 437). A "month" in a charter-party always means a calendar month, unless the context shows the contrary (*Jolly* v. *Young*, 1794, 1 Esp. 106). Under a time freight the charterer may not deduct time occupied in repairs, even though under the contract it is the shipowner's duty to keep the ship in repair, unless it is so stipulated (*Havelock* v. *Geddes*, *ante*; *Ripley* v. *Scaife*, 1826, 5 Barn. & Cress. 167; 29 R. R. 205); but he can counterclaim for such loss. Such stipulations are "hire of ship to cease during breakdown of machinery stopping working of ship more than forty-eight consecutive hours till she is again in efficient state to resume her service" (*Hogarth* v. *Miller*, [1891] App. Cas. 48); or "in event of loss of time by collision, by which vessel becomes incapable of proceeding for more than forty-eight working hours, payment of hire to cease till she is again in efficient state to resume her voyage" (*Hough* v. *Head*, 1885, 54 L. J. Q. B. 294 and 55 *ibid.* 43). In Government charters a clause is often inserted empowering the Admiralty or Transport Commissioners to make an abatement from time freight if delay be caused by breach of orders, or master's neglect of duty, or vessel becoming unable to execute her service (*Beatson* v. *Schanck*, 1803, 3 East, 233; 7 R. R. 436, ship rendered incapable by smallpox among the crew; *Inman* v. *Bischoff*, 1882, 7 App. Cas. 670,

ship striking on rock which necessitated repair). Where no such stipulation is made, the hire runs on without a break; thus under a charter-party for a round voyage, "£6300 to be paid for the first eight months, and 47s. 6d. per month for further time taken to complete the voyage," and where the ship was seized when by charterers' order she was trying to go to a blockaded port, kept detained five or six weeks, and then liberated and brought cargo home, having been thirteen months in all, it was held that freight was due for the whole time (*Moorsom* v. *Greaves*, 1811, 2 Camp. 626). A vessel let for a certain time may not be able to finish the voyages on which she is sent in that time; and in such a case the charterer may pay for the extra time at the chartered rate (*Gray* v. *Christie*, 1889, 5 T. L. R. 577).

Dead freight is a compensation for loss of freight (Lord Ellenborough, *Phillips* v. *Rodie*, 1812, 15 East, 547; 13 R. R. 528), either at an agreed rate or not, payable to the shipowner by the charterer if he fails to ship a full cargo. It will include unliquidated damages for failure to load a full cargo if there are any means of calculating them, *e.g.* if freight be fixed at so much per ton, and a uniform cargo is carried (*Pearson* v. *Goschen*, 1864, 33 L. J. C. P. 265; *Gray* v. *Carr*, 1871, L. R. 6 Q. B. 522; *McLean* v. *Fleming*, 1871, L. R. 2 H. L. Sc. 128).

3. *Basis of Payment.*—Where no rate of freight is mentioned, the freight is calculated at the ordinary rate ruling at the time of shipment (*Gunan* v. *Tyrie*, 1864, 4 B. & S. 600, 709, and 714).

Cargo may be carried "freight free" or at a nominal rate; and this is often the case where it belongs to the shipowner. The bill of lading holder in such case need not pay more than that nominal rate. A shipowner may contract to carry goods in this way in spite of a mortgage on the ship; for he may use his ship as he likes so long as the mortgagee leaves him in possession of her; and if the mortgagee takes possession after the goods have been shipped, he is bound by the contracts regarding them (*Brown* v. *North*, 1852, 22 L. J. Ex. 49; *Keith* v. *Burrows*, 1877, 2 C. P. D. 163 and 2 App. Cas. 636). Similarly, a purchaser of a ship cannot demand more than the freight reserved by the contracts existing with regard to her. Thus where the master of a ship gave bills of lading "freight for goods free on owner's account and deliverable to defendants' order," in ignorance that the shipowner had sold the ship to the plaintiff before such shipment, it was held that no freight was payable, and the fact that the defendants who had sold the goods to the shipowner had claimed them as unpaid vendors, and thus the goods ceased to be on the shipowner's account, made no difference (*Mercantile Bank* v. *Gladstone*, 1868, L. R. 3 Ex. 233). Where goods were being carried by shipowners on their own account, and the ship was wrecked and abandoned to underwriters, and her cargo was brought on in her after the abandonment, it was held that the underwriters could not claim freight from the port of departure home, but they could claim compensation for carrying the goods home from the place of wreck (*Miller* v. *Woodfall*, 1857, 27 L. J. Q. B. 120). Shipowners may, however, make their own goods liable to freight by stipulation to that effect in the contract; and indorsees and assignees from them can only obtain the goods on payment of that freight (*Wegelin* v. *Cellier*, 1873, L. R. 6 H. L. 286).

The basis on which freight is generally payable is the weight or measurement of the goods according to an agreed standard; but the weight when shipped and the weight when delivered may not tally. In such a case the general rule is as follows, viz. that "freight is to be paid on that amount alone which is put on board, carried throughout the whole voyage, and

delivered at the end to the merchant" (Alderson, B., *Gibson* v. *Sturge*, 1855, 24 L. J. Ex. 121, 126). It is more fully stated by Bowen, J., thus: "As a general principle, freight, in the absence of special agreement to the contrary (or uniform custom of trade), becomes payable only on so much cargo as has been both shipped, carried, and delivered. If less has been shipped than has been delivered, as in the case of cargoes which heat under sea water damage, freight is payable on the lesser quantity shipped. If less has been shipped and carried than has been delivered, as in the case of goods which are compressed during the voyage and expand on being unloaded, freight is payable on the compressed and not on the expanded measurements. If, on the other hand, less has been delivered than shipped, as in the case of goods lost on the way, then freight would be payable only on the quantity delivered. But for the convenience of business, contracts are frequently made to vary this *primâ facie* rule" (*Spaight* v. *Farnworth*, 1880, 5 Q. B. D. 115). Carver puts it shortly that if there is any difference between the shipped and delivered weights, freight is paid on the lower, whichever it is; if cargo swells on the voyage, the freight is paid on the quantity shipped, while if it wastes (by drainage or evaporation), it is payable on the quantity delivered (576). Willes, J.'s, opinion that whether the cargo swelled or whether it diminished by drying, freight was payable on the shipped quantity, does not seem to be the correct principle (*Dakin* v. *Oxley*, 1864, 33 L. J. C. P. 119). Thus where 2664 quarters of wheat were shipped, and 2785 delivered, freight was paid on the former (*Gibson* v. *Sturge*, 1855, 24 L. J. Ex. 121); and where a cargo of cotton which had been shipped in a highly compressed condition at Bombay expanded on delivery (beyond the capacity of the ship), and payment was to be made "75s. per ton of 50 cubic feet delivered," payment was held due on the shipped amount (*Buckle* v. *Knoop*, 1867, L. R. 2 Ex. 125, 333). This may be varied by special agreement, *e.g.* by "payment on net weight delivered" of a cargo of green bark, which naturally became lighter on delivery than on shipment, freight was held payable on the lesser quantity (*Coulthurst* v. *Sweet*, 1866, L. R. 1 C. P. 649); or "freight to be payable in case of cargo being delivered in heated or damaged condition on invoiced quantity taken on board as per bill of lading, or half freight upon such damaged portion at captain's option, provided no part be thrown overboard or otherwise disposed of during the voyage, and freight to be at 7s. per imperial quarter delivered," where bill of lading said "quantity and quality unknown," held captain could elect to be paid on the bill of lading quantity (*Tully* v. *Terry*, 1873, L. R. 8 C. P. 670); "freight payable on deals and sawn lumber on *intake measure of quantity delivered*" (*Spaight* v. *Farnworth*, above); "freight to be paid on Wilmington gross intake weight" (*Fullagsen* v. *Walford*, 1883, 1 C. & E. 198); freight payable either "on gross invoice weight" or "gross landing weight" (*Leech* v. *Glynn*, 1890, 6 T. L. R. 306); and timber charters now sometimes make freight payable "on intake measurement of quality delivered as ascertained at port of discharge" (Carver, 578, note).

The usage in a particular trade may control the manner of measurement, *e.g.* Bombay trade, on shipped quantity (*Bottomley* v. *Forbes*, 1838, 5 Bing. N. C. 121, cotton); West India trade, on delivered quantity (Abbott, 296 (5th); and *Gibson* v. *Sturge*, *ante*, sugar and molasses). Where the manner of measurement is left doubtful by the contract, the intention of the parties governs, as ascertained from the circumstances under which the contract was made and the ordinary practice of the particular trade (Carver, 580) (*Nielsen* v. *Neam*, 1884, 1 C. & E. 288, where the freight for a timber cargo was to be "payable for deals and battens per St. Petersburg standard hundreds

£2, 5s.," and this was held equivalent to such a number of these hundreds as ascertained by the customary mode of measurement adopted by the Dock Commissioners for timber cargoes at Mersey Commercial Docks); but the contract may shew the meaning to be put on it: thus "35s. in full per 180 English cubic feet taken on board as per Gothenburg custom," where the cargo was not measured at loading but was measured at Hull on the English system, it was held that the shipowner was entitled to have it measured on the Gothenburg system, which was more favourable to him (*The Skandinav*, 1881, 51 L. J. P. 43). The quantity of cargo mentioned in the bills of lading is not conclusive unless so agreed (*Moller* v. *Living*, 1811, 4 Taun. 102; and see BILLS OF LADING). The expense of measuring cargo in the absence of agreement or usage to the contrary falls on the shipowner, for "the person who wishes to ascertain the quantity must incur the trouble and expense of weighing it" (Willes, J., *Coulthurst* v. *Sweet*, 1866, L. R. 1 C. P. 654); but custom of a particular trade may alter this and make the merchant liable (*Watts* v. *Grant*, 1889, 26 Sc. L. R. 660, grain trade). Freight may be payable according to an agreed scale, *e.g.* per London Baltic printed rates, and the price fixed for a particular article by the contract will be the standard for determining the freight payable for another article according to the scale (*Russian S. N. C.* v. *Silva*, 1863, 13 C. B. N. S. 610; Carver, 583).

4. *Mode of Payment of Freight.*—Unless otherwise stipulated, freight is payable in cash and without deduction, and in the currency of the place of payment (Carver, 584). But if the custom at the port of discharge is to make a deduction, this governs; *e.g.* a custom to allow three months' discount from freight payable under bills of lading on goods coming from New Orleans and other American ports, has been held consistent with a provision of "freight reserved for goods at ½d. per lb." (*Brown* v. *Byrne*, 1854, 23 L. J. Q. B. 313). If payment is by the agreement to be by acceptances, the master or ship's representative must prepare the bills, and the consignee of the goods need only offer to accept them (*Luard* v. *Butcher*, 1846, 2 Car. & Kir. 29); but if it is to be by good and approved bills, the consignee must procure them (*Tate* v. *Meek*, 1818, 2 Moo. 278; 19 R. R. 518). If consignee has option whether to pay in bills or in cash and elects the latter, the shipowner's lien on the goods continues till cash is paid (*Paynter* v. *James*, 1867, L. R. 2 C. P. 348). If the master accepts a bill for the freight, that suspends the right to other payment so long as the bill runs, but that right generally revives on dishonour of the bill if held by the shipowner (*Tapley* v. *Martens*, 1800, 8 T. R. 451); but this depends on the intention of the parties, and, if so intended, taking the bill may be a complete discharge. The master generally has authority to bind his co-owners by taking a bill instead of cash (*Anderson* v. *Hillies*, 1852, 21 L. J. C. P. 750). If the consignee does not pay the freight, the shipper's liability to pay it (preserved by the Bills of Lading Act, 1855, s. 2) may be discharged by a bill being taken, though it was not intended that it should be, *e.g.* when captain takes a bill for his own convenience and not because he cannot get cash (*Strong* v. *Hart*, 1827, 6 Barn. & Cress. 160; 30 R. R. 272; so *Marsh* v. *Pedder*, 1815, 4 Camp. 257). Unless expressly so stipulated, claims for damage cannot be deducted from freight by the person liable to pay it, though they arise in respect of breaches of the contract under which the freight is due (*Meyer* v. *Dresser*, 1864, 33 L. J. C. P. 289, claim for missing goods; *Seager* v. *Duthie*, 1860, 29 *ibid.* 253 and 30 *ibid.* 65, demurrage payable for either shipowner's or shipper's default). If so stipulated, such claims can be deducted (*Garston* v. *Hickie*, 1886,

18 Q. B. D. 17); and if not so stipulated, a counterclaim lies for them (Carver, 586).

5. *To whom Freight is Payable.*—Primarily freight is payable to the person who owns the ship at the time of making the contract; but the ship may have been since sold, or assigned, or mortgaged, or its freight may have been sold or assigned; if in doubt, the consignee of the goods can interplead (*q.v.*).

Generally the master represents the owner, and payment to him is a bar to a claim for freight by the owner, unless the owner has given notice to pay it only to himself; and a payment to a shipowner of freight due under a charter-party made by the master is a bar to a claim for freight made by the master, though the master has given notice not to pay it to anyone but himself (*Atkinson* v. *Cotesworth*, 1825, 3 Barn. & Cress. 647; 27 R. R. 450; *Guion* v. *Trask*, 1860, 29 L. J. Ch. 337). The master may not have this authority to bind his owner at a port where the ship's husband manages the ship, or by a course of business the freight should be paid to the ship's agents; and if an agent be appointed to collect freight, the master's authority is superseded (*The Edmond*, 1860, Lush. 58). The master cannot claim freight as against the owner, though the owner owes him wages or disbursements, and he has a maritime lien on the ship and freight for them (*Smith* v. *Plummer*, 1818, 1 Barn. & Ald. 575; 19 R. R. 391; *Atkinson* v. *Cotesworth*, above; M. S. A., 1894, s. 167). He may sue for freight when he has made the contract for it (*Brouncker* v. *Scott*, 1811, 4 Taun. 1; *Cauthron* v. *Trickett*, 1864, 33 L. J. C. P. 182), and be sued in respect of it (*Priestley* v. *Fernie*, 1865, 34 L. J. Ex. 172), but not as well as the owner (*ibid.*). If he lets the goods out of his hands before payment to consignee on an implied promise to pay their freight, he can sue him (*Shields* v. *Davies*, 1815, 6 Taun. 65). It is no answer to a claim by the master for freight that the person liable to pay it is owed money by the shipowner (*Isberg* v. *Bowden*, 1853, 22 L. J. Ex. 322). A managing owner, where there is more than one owner, is the proper person to receive the freight; he has no charge on it for his own advances, but can retain the amount of his advances out of it when it comes to his hands; he cannot, however, assign this right, though the ship is in his debt (*Guion* v. *Trask, ante*; *Beynon* v. *Godden*, 1878, 3 Ex. D. 163).

The goods owner must pay the person who owns the ship when payment falls due; and an assignee of the ship is entitled to the freight before a subsequent assignee of the freight (*Lindsay* v. *Gibbs*, 1856, 22 Beav. 522). For the right to freight as between vendors and vendees and mortgagees of ships, see SHIP (MORTGAGE). For the right to receive freight as between the owners and charterers, see CHARTER-PARTY; BILLS OF LADING.

6. *By whom Freight is Payable.*—Primarily the person making the contract is liable to pay their freight, *i.e.* where there is no charter-party, the shipper, even after delivery has been made to a consignee. This liability of the original shipper is preserved by the Bills of Lading Act (see BILLS OF LADING); but the shipowner may lose his right of recourse against the shipper by giving credit to the consignee, and taking a bill for his own convenience (*Strong* v. *Hart*, *ante*). Under the Bills of Lading Act, also, anyone receiving goods under a bill of lading, who has also the property in the goods, is liable to the shipowner for freight. And any bill of lading holder claiming goods under it, though he has not the property therein, may be liable for freight, as impliedly promising to pay it (*Allen* v. *Coltart*, 1883, 11 Q. B. D. 785); and such liability may also arise on proof of the course of business between the parties being to that effect (*Wilson* v. *Kymer*, 1813, 1 M. & S. 157). Where, however, notice is given that the person receiving the goods is an agent only, the mere receipt of goods by

him does not found a promise that he will be personally liable for freight (*Amos* v. *Temperley*, 1841, 8 Mee. & W. 798; *S.S. Lancaster* v. *Sharp*, 1889, 24 Q. B. D. 158).

For charter-party freight the charterer is generally liable, even though bills of lading for the same amount are outstanding with shippers or third parties (*Christy* v. *Row*, 1808, 1 Taun. 310; 9 R. R. 776); and the shipowner may recover it from him before trying the bill of lading holders, though he has delivered them their goods without payment (*Shepard* v. *De Bernales*, 1811, 13 East, 565; 12 R. R. 442). Assignment of the charter-party will not, without the consent of the shipowner, release the charterer from liability (*Dimech* v. *Corlett*, 1858, 12 Moo. P. C. 199). Generally, however, by the "cesser" clause the charterer is only bound to find a cargo for the voyage, and his liability ceases when it is shipped, the shipowner being given a lien for it for freight, etc. (see CHARTER-PARTY; Carver, 607).

7. *Means of enforcing Payment.*—Apart from his right of action at law, as a general rule the shipowner has a lien on goods which he has carried under a contract of sea carriage for their freight, and may detain them till it is paid, unless, perhaps, they were shipped without the authority of or in fraud of their owner (Carver, 652). This lien is a common law one. It exists apart from express contract, and it is not lost by making an express contract unless that is inconsistent with it. It is confined to the particular shipment on which it is due, unless express agreement or general usage of trade extend it further. This lien attaches not only to freights due under bills of lading, but also to those under charter-parties, whether lump sums or payments in proportion to what is carried, and also, it seems, to time freights, if the shipowner in this case is carrier of the goods, and does not merely lease the ship to the charterer, provided that the delivery of the goods and payment of the freight are to be made concomitantly by the contract (*Tate* v. *Meek*, 1818, 2 Taun. 280; 2 Moo. 278; 19 R. R. 518; *Yates* v. *Meynell*, 1818, 2 Moo. 297; 19 R. R. 527; *Saville* v. *Campion*, 1819, 2 Barn. & Ald. 503). Where there is no express stipulation as to the time and manner of payment of freight, the master is not bound to part with the goods till his freight is paid (*Black* v. *Rose*, 1864, 2 Moo. P. C. N. S. 277).

Where, however, the charter-party allows the charterer to use the ship as a general ship, and the master is to sign bills of lading as required, and the charterer is to collect the freights under those bills of lading, it seems that the shipowner will have no lien, whether against the charterer or the bill of lading holder, for the charter-party freight does not become due till the cargo is completely delivered (*Brown* v. *Tanner*, 1868, L. R. 3 Ch. 597, where the charter-party freight was to be "paid on the unloading and right delivery of cargo as customary"; and the freight was held to be not due till "the purpose of the voyage was completely carried out"). Where the charter-party gave a lien for freight, but also provided that any difference between charter-party and bill of lading freight, if a deficiency, should be paid in advance, and if an excess, should be deducted by charterer's agents at port of discharge, the Court of Appeal held this gave the shipowner no lien for the former difference (*Gardner* v. *Trechmann*, 1884, 15 Q. B. D. 154).

The shipowner may detain all goods liable to freight till the whole freight on them has been paid (*Perez* v. *Alsop*, 1862, 3 F. & F. 188), or he may give delivery and receive freight by instalments (*Black* v. *Rose*, *ante*), or, after delivering some, he may detain the remainder for the freight due in respect of all (*Sodergren* v. *Flight*, 1796, 6 East, 622). Goods comprised in several bills of lading belonging to the same person and shipped under

one contract are treated as one parcel of goods; and before they are all delivered any of them may be detained for the freight due for them all; while if several bills of lading have been given for different parts of one shipment, and assigned by the shipper to different persons, the shipowner cannot exercise his lien on the goods in one bill of lading for the freight due on another (*Bernal* v. *Pim*, 1835, 1 Gale, 17).

There is no lien either at common law or equity for dead freight; it must be given by express stipulation (*Phillips* v. *Rodie*, 1812, 18 East, 547; 13 R. R. 528; *Bailey* v. *Gladstone*, 1814, 3 M. & S. 205). A lien for freight and dead freight is generally given in modern charters thus: "Shipowner to have absolute lien on cargo for recovery of freight, dead freight, and demurrage." Such a clause gives a lien on the outward cargo of a charter-party out and home, though it be agreed that the freight is to be calculated on the homeward cargo (*Gilkison* v. *Middleton*, 1857, 26 L. J. C. P. 209). This lien for freight, whether common law or contractual, is excluded if the terms of the charter-party or bill of lading are inconsistent with it, *e.g.* by agreement to pay freight, "part on sailing, part on delivery of outward cargo, and part in cash two months after vessel's report inwards, and after right delivery of cargo" (*Foster* v. *Colby*, 1859, 28 L. J. Ex. 81); but where payment is to be made by bills, the lien continues till the bills have been given, and it was held to so continue where the bills were not payable till two months from the day that delivery should be completed, for the goods might be landed in the captain's name, and delivered all in one day (*Tate* v. *Meek*, 1818, 8 Taun. 280; 19 R. R. 518). If under the charter-party the possession of the ship is given to the charterer, the owner has no lien on the goods loaded for the unpaid charter-party freight (*Belcher* v. *Capper*, 1842, 4 Man. & G. 502; *Christie* v. *Lewis*, 1821, 2 B. & B. 410; 23 R. R. 483; *Hutton* v. *Bragg*, 1816, 7 Taun. 14; 12 R. R. 431), unless the charter-party gives an express lien for the freight, and the goods belong to assignees from the charterer, who should have made inquiry as to the contract under which the goods were carried (*Small* v. *Moates*, 1833, 9 Bing. 574). See BILLS OF LADING.

In the case of advance freight, it has been doubted whether the shipowner has any lien on the cargo. Lord Ellenborough held that this is not properly freight at all (*Blakey* v. *Dixon*, 1800, 2 Bos. & Pul. 321); and Lord Kingsdown, in the Privy Council, expressed a similar view, with special reference to the lien attaching to freight. "A sum of money payable before the arrival of the ship at her port of discharge, and payable by the shippers of the goods at the port of shipment, does not acquire the legal character of freight because it is described under that name in a bill of lading, nor does it acquire the legal incidents of freight. . . . Where the parties, instead of trusting to the general rule of law with respect to freight, make a special contract for a payment which is not freight, it must depend on the terms of that contract whether a lien does or does not exist; when the contract gives no lien, the Court will not supply one by implication" (*Kirchner* v. *Venus*, 1859, 12 Moo. P. C. 361). And in a previous case before the Privy Council, similar in circumstances to *Kirchner* v. *Venus*, where the freight was to be paid "one month after sailing, ship lost or not lost," by the shipper (in *Venus*' case it was to be paid to a third person at the port of loading), and the shipowner was not allowed to detain the goods at the port of discharge for the unpaid freight, Baron Parke, in delivering the judgment, stated that "the word freight is not used in the sense that would give a right of lien; . . . the shipowner is entitled to lien on goods for freight properly so called, that is for carriage and delivery of goods, unless he has entered into a

contract inconsistent with that lien, *e.g.* as where the contract is to pay after delivery for cargo, and not at time of delivery of cargo" (*How* v. *Kirchner*, 1857, 11 Moo. P. C. 21). On the other hand, in a case decided previously to *Kirchner* v. *Venus*, where a ship was chartered for a round voyage for £900, partly payable in advance by bill, and owners were to have a lien on cargo for all freight, and the ship was put up as a general ship, and the charterers loaded some goods which they consigned to persons at the outward port under bills of lading signed by the master, which made freight payable at port of loading one month after sailing, ship lost or not lost, and the charterers' bill was dishonoured before the ship arrived, the Court of Common Pleas held that the shipowners were entitled to a lien against the bill of lading holders for the bill of lading freight, but not for the charter freight, though they would have been entitled to sue for this if the master, by giving bills of lading, had not substituted the liability under the bill of lading for that under the charter-party as against the bill of lading holders (*Gilkison* v. *Middleton*, 1857, 26 L. J. C. P. 209). The Court of Queen's Bench similarly, in a case where goods were consigned to persons abroad under a bill of lading which made freight payable by shippers one month after sailing, held that the shipowner was entitled to a lien on the goods for unpaid freight (*Naish* v. *Graham*, 1857, 27 L. J. Q. B. 15). The test of whether a lien is given or not, as pointed out by these cases, is whether the contract is inconsistent with a lien. Carver thinks that in the Privy Council cases it was so, while in the other cases it was not, the Bills of Lading Act applying to the latter, but not to the former (663). Lord Kingsdown's opinion that "advance freight has not the legal character of freight, and does not acquire the legal incidents of freight," has, however, so far as lien is concerned, never been attacked; and though perhaps the right to lien for advance freight may exist in certain cases without being expressly given by the contract, the safer general rule undoubtedly is that it must be created by the contract. If the bill of lading represents that the freight has been paid, the shipowner is estopped from denying it as against a *bonâ fide* holder of it for value, and cannot claim a lien (*Howard* v. *Tucker*, 1831, 1 Barn. & Adol. 712).

Where the voyage is abandoned, and bills of lading are not signed, though this be owing to the charterer's failure, the shipowner can claim no lien (*Nyholm* v. *Child*, 1873, 43 L. J. Bky. 21); nor can he where the ship is wrecked and the voyage is abandoned, and he does nothing in the way of salving either ship or cargo, although by the bill of lading the freight was "payable at port of discharge, ship lost or not lost" (*Nelson* v. *Assoc. Prot. Comm. Interests*, 1873, 43 L. J. C. P. 218). If half the freight is to be paid in advance by charterer's acceptance, and that acceptance is still running when the charterer becomes insolvent, he has no lien for the amount which is covered by the outstanding acceptance (*Tamvaco* v. *Simpson*, 1866, L. R. 1 C. P. 363); but it was not decided whether in such a case, if the ship had not arrived till after the dishonour of the acceptance, the lien would have been available or not.

Whether liens for freight, etc., given in a charter-party are preserved against shippers or assignees of bills of lading, has been already discussed under Bills of Lading; see vol. ii. 118 and 119. Putting it shortly, where bills of lading are given which do not incorporate, either expressly or by reference, the charter-party liens for freight or dead freight, those liens cannot be made available against shippers who are strangers to the charter-party or assignees for value of bills of lading, whether from the charterers or from strangers to the charter-party, though they have notice of the

charter-party, unless the master had, to their knowledge, whether actual or obtainable by inquiry, which they ought to have made, no authority to give the bills of lading (Carver, 675). Where a person ships goods in a chartered ship under contract with the charterer only, and takes no bill of lading from the shipowner or his agents, it would seem that the charter-party liens can be enforced against him. But in a case where a shipper, in ignorance of a charter-party, arranged with the master for a certain freight, the master and crew being the shipowner's, but the ship being advertised in the charterer's name, and, instead of a bill of lading, he was given a receipt for goods from the charterer's agents, it was held that the charter-party lien for freight was not enforceable against him (*The Stornoway*, 1882, 4 Asp. 529; and see *Paul* v. *Birch*, 1743, 2 Atk. 621). Where goods have been loaded under a sub-charter, it is too late to insert in the bills of lading a provision for payment of the freight under the charter-party for which a lien was reserved (*Tharsis S. & C. M. C.* v. *Culliford*, 1873, 22 W. R. 46).

In order to keep his lien, the shipowner must retain possession of the goods; for the effect of warehousing them, see CARGO; WAREHOUSE. The lien may be lost by conduct inconsistent with it, *i.e.* taking a bill of exchange; but if the bill be dishonoured at maturity before the goods are delivered, the lien will revive. It may also be lost by the goods being taken in execution, and sold at the suit of the shipowner, or by his claiming to hold them otherwise than under the lien (Carver, 679 and 680; and see LIEN). The shipowner's lien for charter-party freight against the charterer is not lost by his delivering the cargo to consignees, and collecting freights due under bills of lading (*Christie* v. *Lewis*, 1821, 2 B. & B. 410; 23 R. R. 483). If the contract becomes impossible of performance, *e.g.* by there being no means of carrying the goods on, the lien lapses (*Nelson* v. *Assoc. Prot. Comm. Interests*, 1873, 43 L. J. C. P. 218); but if the shipowner can tranship, and does so, it seems that it is retained (*Matthews* v. *Gibbs*, 1860, 30 L. J. Q. B. 55); and where a cargo could not be delivered at the place ordered by the charterer, but was delivered at a port within the scope of the charter, the chartered lien continued in force (*The Teutonia*, 1872, L. R. 4 P. C. 171).

For the rights of freighters and shippers of cargo *in rem* and *in personam* against a ship for breach of the contract of carriage, see ADMIRALTY ACTION; BILLS OF LADING; CHARTER-PARTY.

[*Authorities.*—Carver, *Carriage by Sea*; Abbott, *Merchant Shipping.*]

French (or Fancy) Bread.—Ordinary BREAD must be sold by weight and in no other manner; and every baker or seller of bread (including a baker delivering bread to a customer in a cart at his house in pursuance of a general order (*Robinson* v. *Cliff*, 1876, 1 Ex. D. 294)) contravening this requisite is liable for each offence to a penalty not exceeding forty shillings (6 & 7 Will. c. 37, s. 4). "French or fancy bread or rolls" is, however, excepted from this prohibition (*ibid.*). It is not the *quality* of bread which makes it "French or fancy." The test is whether, in the language of the section, it was "usually sold as French or fancy bread" at the commencement of the Bread Act, 1836 (viz. 1st October 1836) (*Aerated Bread Co.* v. *Gregg*, 1873, L. R. 8 Q. B. 355, dissenting from the opinion to the contrary of the majority of the judges in *R.* v. *Wood*, 1869, L. R. 4 Q. B. 599). In the former case it was held that bread made in separate loaves which were put separately in the oven, so as to be baked crusty all over, but possessing the same ingredients as ordinary bread, with the

superaddition of carbonic acid gas, was not "French or fancy bread" within the meaning of the statute.

French Law.—The history of French law does not fall within the scope of this work, unless in so far as it serves to explain the origin of the laws now in force in Quebec and other parts of the British Empire.

In France, as in Western Europe generally, the Roman law, as embodied in the Code of Theodosius, may be regarded as the basis of the local law. The capitularies of the Frankish emperors were framed on Roman models; but in course of time the unity of the imperial system was lost, and each district developed its own feudal custom. These customs were reduced to writing at an early period: the *Coûtume* of a French province was not an oral tradition, but a body of carefully framed rules. Thus, for example, the duchy of Normandy has its *Très-ancien Coûtumier* and *Grand Coutumier*—documents which are still of practical importance in relation to the laws of the CHANNEL ISLANDS (*q.v.*).

The *Coûtume* of Paris, introduced by royal edicts into the French colonies, formed the basis of the law in Quebec and elsewhere. The diversity of provincial customs, and the oppressive incidents of feudal jurisdiction, were the cause of frequent complaint. When the provinces were united under one strongly centralised Government, the king and his advisers endeavoured to make the administration of justice more systematic by means of *Ordonnances* or royal orders; these measures were sometimes resisted, and there were eminent lawyers who maintained that an Ordonnance affecting established rights ought not to be issued unless on the petition or with the approval of the States-General. Special importance attaches to the Ordonnance of Moulins (1566), and to the three great Ordonnances in which the Chancellor Daguesseau codified the law relating to donations, testaments, and substitutions.

In the sixteenth century, Charles du Moulin (1500–54) endeavoured to show that the *Coûtumes* might be harmonised, by comparing them in detail, and by studying them in the light of general principles. He was followed in this line of inquiry by Antoine Loisel, and by Domat (1625–96), whose great work, *Les Lois Civiles dans leur Ordre Naturel*, may be said to have laid the foundation of the Codes. Domat owed much to the friendship of Councillor Daguesseau; he resided in his friend's house, and directed the legal studies of his son, Henri-François Daguesseau (1668–1752), afterwards Chancellor. Among the many scholars who looked to the learned Chancellor as their patron, the most famous was R. J. Pothier (1699–1772), who occupied a subordinate judicial position at Orleans. Pothier's works—his commentary on the *Coûtume* of Orleans, his monumental attempt to rewrite the Pandects, his lucid and interesting Treatise on Obligations—were widely accepted and used as text-books; they have done much to fix the rules of modern French law.

On the 21st August 1790, the Constituent Assembly decided that the laws should be made clear and simple; after many delays, their project resulted in the formation of the five Codes now in use (see the article CODE NAPOLEON). Besides these five, there is a Code Forestier, which applies to the forests which are the property of the State.

[*Authorities.*—Viollet, *Précis de l'Histoire du Droit Français*; Ferrières, *Coûtume de Paris*; *Recueil des Anciennes Lois*, and works of the authors mentioned in the foregoing article. For the Codes, the edition annotated by Sirey is much used by practitioners. Much information as to the history and

detailed rules of French law will be found, arranged alphabetically, in the voluminous *Répertoire* of Dalloz; see also the annual volumes of Dalloz, *Jurisprudence Générale.*]

Frequenting.—The Vagrancy Act, 1824 (5 Geo. IV. c. 83, s. 4), and the Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112, s. 15), punish persons "frequenting" a public street with intent to commit felony. In *Clark* v. *R.*, 1885, 14 Q. B. D. 92, this was held insufficient to warrant conviction of a person merely "loitering," and the Acts were amended by 54 & 55 Vict. c. 69, s. 7, so as to include loiterers. See also INTOXICATING LIQUORS (*Offences*).

Fresh Step.—Appearance to a writ, irregularly issued, is a "fresh step" within R. S. C., Order 70, r. 2 (dealing with applications to set aside for irregularity); and see vol. i. at p. 301.

Friendly Societies.—Mutual benefit societies were first recognised by law in 1793 (33 Geo. III. c. 54), but their legal *status* depended on their enrolment with the clerk of the peace and confirmation of their rules by justices. These conditions were doubtless imposed in view of the Jacobin clubs, corresponding societies, and other suspected organisations in vogue at that epoch (see 39 Geo. III. c. 79; 57 Geo. III. c. 19). Since 1793 there has been a steady flow of amending legislation on the subject, varied at intervals of a generation by Consolidation Acts of 1829, 1850, 1875, and lastly in 1896 by two Acts, the Friendly Societies Act (59 & 60 Vict. c. 25), and the Collecting Societies Act, 1896 (C. 26). A table showing the mode in which prior legislation has been rearranged is given in the Chief Registrar's Report for 1896, Parl. Pap. 1897, C. 97, p. 140. By these Acts and Treasury Regulations of 1897 (St. R. & O., No. 6, of January 1, 1897, Parl. Pap. 1897, C. 97, p. 143, and St. R. & O., No. 428, of June 15, 1897) all friendly societies are now regulated.

It is impossible to do more here than give a brief résumé of the law as it now stands. The subject is dealt with from historical, administrative, and judicial aspects in the sixteen Statutory Annual Reports presented by the Registrars to Parliament, of which a general index has now been printed. That of 1896 (Parl. Pap. 1897, C. 97, i. ii. iii.) is the most complete treatise and commentary on the Act as yet available. But valuable information will be found in Baden Fuller on *Friendly Societies*, 1896, and from the point of view of collecting societies in Diprose and Gammon's *Friendly Societies Law Cases*, 1897.

Societies and their branches in existence before January 1, 1897, are treated as if registered under the Act of 1896, if they or their rules were enrolled, certified, or registered under prior Acts, and their rules continue in force until altered or rescinded, except so far as they conflict with express provisions of the Act of 1896 (s. 101), and in particular the contingent annual payments to which members or their nominees may be entitled under the rules of societies or branches established before August 15, 1850, are left unaffected (ss. 40–101 (2)). A similar provision was contained in the Act of 1875, as to the effect whereof see *Rudd* v. *James*, [1896] 2 Ch. 544. The number of such societies existing on January 1, 1896, was 24,853. A complete list of those registered in 1896 is given in Parl. Pap. 1897, C. 97, p. 215.

The Friendly Societies Act, 1896, applies to the following classes of societies:—

1. *Friendly Societies proper*, formed by voluntary subscriptions (supplemented or not by donations) for all or any of the purposes following (s. 8):—

(*a*) Relief or maintenance of members *in sickness or bodily or mental infirmity, or in old age* (*i.e. after fifty*), or when travelling in search of work, or in distress, or on shipwreck, or loss of boats or nets; relief or maintenance in the events above italicised of a member's spouse or children, or dependents, near of kin, or orphan wards, or his orphan children during minority; endowment of a member or his nominees at any age.

(*b*) Insurance in the cases following:—Of money to be paid on the birth of a member's child, or on the death of a member, or for the funeral expenses of his spouse, child, or widow, subject to restrictions as to the amount payable on the death of a child under five (s. 62); against loss by fire, not exceeding £15, of a member's tools or implements of trade (s. 81 (*e*)).

The benefits to be assured must, if annuities, not exceed £50 per annum, nor a gross sum of £200 (ss. 81 (*e*), 41). Societies of this kind are not charities (*Cunnack* v. *Edwards*, [1896] 2 Ch. 679). Annuity societies are not allowed to be registered unless their actuarial valuations have been approved (s. 16).

Societies of Class 1. do not fall within the Life Assurance Companies Act, 1870 (33 & 34 Vict. c. 61, s. 2). See *Newbold Friendly Society* v. *Barlow*, [1893] 2 Q. B. 128; INDUSTRIAL ASSURANCE SOCIETY.

2. *Cattle Insurance Societies*, for insuring to any amount against loss by death of neat cattle, sheep, lambs, swine, and horses from disease or otherwise (s. 8 (2)).

3. *Benevolent Societies*, formed for any benevolent or "charitable" purposes as distinct from mutual purposes, *i.e.* for providing benefits for non-members. As to what is a charity, see *Income Tax Commissioners* v. *Pemsel*, [1891] App. Cas. 531; *Cunnack* v. *Edwards*, [1896] 2 Ch. 696; *In re Buck*, [1896] 2 Ch. 727.

4. *Working Men's Clubs*, for purposes of social intercourse, mutual helpfulness, and moral improvement, and rational recreation, or any one of them (s. 8 (4)).

5. *Specially authorised Societies*, for a purpose which the Treasury authorises as one to which the Act of 1896 should be extended (s. 8 (5)). A list of the Treasury authorities is given in Chit. *Stat.* for 1896, p. 137, to which is to be added a minute of 15th June 1893 as to societies "for the promotion of the pursuit of angling." The purposes include quoits, music, literature, cookery, science, agriculture, bicycling, and the provision (subject to the law of champerty and maintenance) of legal aid in claims under the Employers' Liability Act, 1880 (*ubi sup.*, 15). The procedure as to registering these societies is modified by the Act of 1896, and the sections of the Act which do and do not apply to such societies are specified on form A 2 scheduled to the Treasury Regulations, 1897 (*vide* Parl. Pap. 1897, C. 97, pp. 26, 27, 28, 153).

COLLECTING SOCIETIES fall under the Friendly Societies Act, 1896, as to registration. The registered societies number about forty, and have a very large average membership (90,000) as compared with the non-collecting societies (Parl. Pap. 1897, C. 97, p. 2). The number of unregistered collecting societies is unknown, but they are subject to the Act of 1896 (c. 26). As to INDUSTRIAL ASSURANCE SOCIETIES, see that title.

All these classes may be registered under the Act, and may be registered by following the procedure indicated by secs. 9–16 and the schedules of the

Act of 1896, and the Treasury Regulations of 1897, rr. 3–9. The procedure involves lodging a copy of their rules, and of any amendments made. Model rules have been prepared by the chief registrar (Parl. Pap. 1897, C. 97, p. 188) embodying the requirements of Sched. 1 of the Act of 1896, c. 25. Where a society has branches, *i.e.* a number of the members of a society (under the control of a central body) who have a separate fund under their own administration, but are bound to contribute to a fund under the control of a central body (s. 106), the registration is subject to secs. 17–22 and Treasury Regulations 10–13. Branches may secede from the parent society (see Diprose, pp. 150–156). Appeals lie to the chief registrar from the refusal by an assistant registrar to register societies or amendments of rules (59 & 60 Vict. c. 25, s. 12; Parl. Pap. 1897, C. 97, pp. 28, 31).

Consequences of Registration — Obligations. — Registered societies are subjected to the Treasury Regulations, 1897, 14–20. They cannot recover members' subscriptions by action (s. 23) except in the case of such cattle insurance societies as have rules providing for recovery of sums payable thereunder, or of specially authorised societies which the Treasury allows to have such right and rules (s. 31). They must have a registered office (s. 24), trustees (s. 25), annual audit (s. 26), and make annual returns (ss. 27, 84, 88). A guide to making up such returns has been framed by the chief registrar (Parl. Pap. 1897, C. 97, p. 37). They must also make a quinquennial valuation of assets (s. 28; Parl. Pap. 1896, C. 94, p. 16; 1897, C. 97, p. 39), and keep in a conspicuous place in the office copies of balance-sheet, valuation, and auditors' reports (s. 29). The Treasury may appoint public auditors and valuers to be employed at the option of the societies, at fees to be settled by the Treasury. The latest minutes on the subject are printed in Baden Fuller, pp. 155–169. One hundred public auditors were appointed in 1896, but their services are not in great demand, from the societies preferring their own auditors (Parl. Pap. 1897, C. 97, pp. 31, 41).

The object of the quinquennial valuation is to enable the chief registrar to prepare and publish information on the statistics of life and sickness, and to ascertain the solvency of the societies and the adequacy of the actuarial calculations on which the contributions are based (see Parl. Pap. 1897, C. 97, pp. 18–24). An elaborate report on the sickness and mortality experience deduced from the returns of 1856 to 1880 was published in 1896 (Parl. Pap. 1896, C. 303).

Benevolent societies, working men's clubs, and cattle insurance societies are not liable to quinquennial valuation, nor are special authorised societies, unless the registrar so directs, and he is given a dispensing power in case of friendly societies (s. 28 (5)). (Parl. Pap. 1897, C. 94, p. 39.)

Consequences of Registration—Privileges.—Societies under any of the above heads which are registered and conform to sec. 32 are not within the Unlawful Societies Act, 1799, or the Seditious Meetings Act, 1824. Unregistered societies which exact any unauthorised test or declaration appear to fall within these Acts. The exact legal status of an unregistered society is difficult to define (see Baden Fuller, *Friendly Societies*, 22, 23); but apart from the old Acts, even if illegal, it is not criminal, and its members appear to be joint beneficial owners of its property for purposes of civil as of criminal proceedings to protect their property (*R.* v. *Stainer*, 1869, L. R. 1 C. C. R. 230; *R.* v. *Tankard*, [1894] 1 Q. B. 548), even though they may not be a copartnership (see *R.* v. *Robson*, 1886, 16 Q. B. D. 237).

It has been held by justices that sec. 28 of the Act of 1875 (s. 84 (*c*) of the 1896 Act), imposing a penalty for paying on death of an insured child without production of a death certificate, applies to unregistered societies

(Parl. Pap. 1896, C. 94, p. 11). Where the society is registered and the offender is clerk or servant to the trustees, he may be prosecuted for embezzlement or larceny (*R.* v. *Miller*, 1842, 2 Moo. C. C. 249; *R.* v. *Murphy*, 1850, 4 Cox C. C. 101; *R.* v. *Proud*, 1861, 31 L. J. M. C. 71), or for false pretences (*R.* v. *Dent*, 1 C. & M. 249; *R.* v. *Wooley*, 1850, 1 Den. 557; *R.* v. *Welman*, 1853, 1 Dears. & P. 189).

Neglect by a society or its officers of its obligations under the Act is summarily punishable in the cases enumerated in secs. 84–86, 89, 91, 92, 93 of the Act, and also may involve exercise of the supervisory and disciplinary powers of the registrar. Prosecutions are frequent (see Parl. Pap. 1896, C. 94, pp. 13, 297, 300; 1897, C. 97, pp. 17, 267).

A registered society differs from a company under the Companies Acts, not in the minimum number of members, which is the same, namely, seven, nor in the need of being registered, which exists as to both, but under different officers; but in the fact that it does not thereby become a corporation and is in legal proceedings represented by its trustees suing as such. Power to become a joint-stock company is given, but not often exercised (s. 94). A friendly society has through its trustees all the ordinary civil rights of a legal person, *plus* the special right of settling disputes, and special remedies in respect of the misappropriation of its funds (ss. 84–93). The remedies of the society against persons who have misappropriated its funds are (1) by action by the trustees against the offender for money had and received (*Sinden* v. *Bankes*, 1861, 3 El. & El. 623); (2) by summary proceedings for a penalty under the Acts, which, if resulting in an order under sec. 87, are a bar to an action for the same moneys (*Vernon* v. *Watson*, [1891] 2 Q. B. 288); (3) by indictment for larceny or embezzlement. Registered societies are subject to Treasury Regulations, 1897, rr. 21–24. They are exempt from certain stamp duties (s. 33) and income tax, have privileges as to transfer of stock standing in the name of trustees, and investment, priority of claim after the Crown against the estates of accountable officers in respect of moneys received *virtute officii* (s 35; *In re Miller*, [1893] 1 Q. B. 327; *In re Aberdein*, 1896, W. N. 154 (5); Parl. Pap. 1897, C. 97, p. 45), membership of minors (s. 36), and subscriptions to hospitals and similar institutions in the interest of the society (s. 37). The management and investment of property and funds are regulated by secs. 44–55 and the registered rules. Elaborate provisions are made (ss. 69–75) for the change of name, amalgamation of societies, or their conversion into companies under the Companies Acts, 1862 to 1890. Unauthorised promotion of amalgamation by officials is punishable on summary conviction (s. 90).

Property and Investments.—The investment of the funds of friendly societies is regulated by secs. 44–53 of the Act of 1896. Subject to the rules of the society, a number of enactments not repealed by the Act relate to such investment (3 & 4 Will. IV. c. 14, s. 25; and 23 & 24 Vict. c. 137; 26 & 27 Vict. c. 87, ss. 60, 68; 40 & 41 Vict. c. 13, ss. 16, 17; 46 & 47 Vict. c. 72, s. 21), but they seem to be superseded by the express provisions of the Act of 1896 as to investments in savings banks and with the National Debt Commissioners.

Investments with the National Debt Commissioners are in substance guaranteed by the State (45 & 46 Vict. c. 72, s. 21), and provision is made for the disposal of any surplus from the friendly societies fund, and the rendering of an annual account of it to Parliament (40 & 41 Vict. c. 13, ss. 16, 17). As to forgeries affecting property of friendly societies, see FORGED TRANSFER.

It is said that an incorporated bank cannot be treasurer of a friendly society (*Ex parte Swansea Friendly Society*, 1879, Diprose, p. 59).

Members' Rights.—The rights of members are regulated by the registered rules and any amendments made even without their assent which are binding on them (*Stooke* v. *Mutual Provident*, 1891, Diprose, p. 195; *Dixon* v. *Thompson*, 1893, Diprose, p. 46; *Souter* v. *Davies*, 1895, Diprose, p. 69). They are also entitled to copies of rules and annual returns, and to inspect the books except loan accounts of other members (ss. 38–41). The limit of benefit (s. 41) in a friendly society has already been stated. Militiamen and naval or other volunteers are protected from forfeitures for absence on service (s. 43). The payments on the death of members and children are regulated by secs. 56–66, which provide for a substitute for representation by means of nomination; and as to the death duties payable, see DEATH DUTIES. The Provident Nominations and Small Intestacies Act, 1883, no longer applies to registered societies (1896, c. 25, s. 107).

The provisions of sec. 23 of the Divided Parishes Act, 1876, as to payments to the poor-law authority by trustees of annuities payable to chargeable paupers, do not apply to moneys to which the pauper is entitled as member of a benefit or friendly society (42 Vict. c. 12, s. 1). But under the later enactment, which does not extend to trade unions (*Winder* v. *Kingston-on-Hull*, 1888, 20 Q. B. D. 412), the poor-law guardians, where the right to receive the benefit is undisputed, and if there is no wife or relative dependent on the pauper, whether he be lunatic or sane (*R.* v. *Richardson*, [1894] 2 Q. B. 923), and is not excluded by the rules (*Caister Union* v. *Cleaver*, 1893, 56 J. P. 503), may obtain an order from a Court of summary jurisdiction, enforceable by distress (*R.* v. *Swindon JJ.*, 1880, 42 J. P. 407), against the society for the cost of relief duly given under the poor law, if the guardians or the relieving officer have declared the relief a loan, and have given the society, within thirty days of the declaration, written notice thereof.

Guardians of the poor may grant outdoor relief to members of "friendly societies" in receipt of benefit, and have a discretion in computing the amount of relief to ignore the amount of benefit received (57 & 58 Vict. c. 25, s. 1).

Disputes.—Sec. 68 deals with the settlement of disputes by arbitration under the rules, or reference to the chief registrar, in accordance with Treasury Regulations (1897, rr. 26–32), or in the absence of provision in the rules by a County Court or Court of summary jurisdiction. The Court registrar, or arbitrator, may, but cannot be compelled to, state a special case for the High Court. The limits of the jurisdiction of the domestic tribunal created by the enactments consolidated in this section, and more clearly defined thereby, are considered in *Palliser* v. *Dale*, [1897] 1 Q. B. 207; criticised by the chief registrar (1897, C. 97, p. 54). But its general interest is to keep cases out of the High Court (*Norton* v. *Counties Conservative Building Society*, [1895] 1 Q. B. 246). Disputes may be referred to the chief registrar by the disputants or the High Court, and his decisions are reported in his annual reports (see Parl. Pap. 1896, C. 94; 1897, C. 97, pp. 47, 63).

The justices cannot interfere with the award of an arbitrator (*Bache* v. *Billingham*, [1894] 1 Q. B. 107), unless it has been set aside for impropriety.

Supervision.—The staff for supervision and control of friendly societies consists of a chief registrar, and one or more assistant registrars for England attached to the Central Office, and having such assistants skilled as actuaries or accountants as the Treasury approve. The salaries and expenses of the

office, and administration of the Act, are defrayed by Parliament, subject to Treasury control (s. 5). The office has the function of registration and supervision and examination of the rules, and of the actuarial estimates of societies, and, on reference, of determining disputes; and is also under secs. 76–83 authorised to institute an inspection of the affairs of a society, and if the facts require it, to cancel or suspend the registration of the society, and dissolve it and wind up its affairs (see *Wilmot* v. *Grace*, [1892] 1 Q. B. 812). As to the causes and extent of cancellation, suspension, and dissolution, see Parl. Pap. 1896, C. 94, pp. 16, 277–285; 1897, C. 97, pp. 14, 15, 248–264.

The fees taken in the registry are prescribed by the Treasury Regulations, 1896, 70–73, and the forms in use for rules, etc., are scheduled to the Treasury Regulations. Documents required to be sent to the registry by societies are registered and recorded by the registrar (s. 7), subject to a power of destroying valueless documents (St. R. & O. 1896, p. 576).

The chief registrar has also duties of registration, supervision, and control over BUILDING SOCIETIES, INDUSTRIAL ASSURANCE SOCIETIES, INDUSTRIAL AND PROVIDENT SOCIETIES, LOAN SOCIETIES, SAVINGS BANKS (*Trustees and Railway*), SCIENTIFIC AND LITERARY SOCIETIES, and TRADE UNIONS (*qq.v.*).

[*Authorities.*—Pratt on *Friendly Societies*, 13th ed., 1897; Fuller, *Friendly Societies*, 1896; and authorities cited in the text.]

Friendly Suit.—A suit brought by arrangement between parties to obtain a decision of the Court upon some matter in issue between them. In the old Chancery practice the term was frequently used in connection with administration actions to compel creditors to take an equal distribution of the assets; for this purpose the Court allowed a friendly bill to be filed against executors or administrators in a suit nominally at the instance of a creditor, but in truth by the executors or administrators themselves (see Williams, *Executors*, 8th ed., 1926).

From.—The word "from" is used in law in a considerable variety of senses and juxtapositions, of which only the principal can be indicated here. Sometimes it is equivalent to "within," *i.e.* two specified periods of time. Here a reasonable mean between the two extremes is expected to be observed in any event. See *Ashforth* v. *Redford*, 1873, L. R. 9 C. P. 22; reported *sub nom. Ashworth* v. *Redford*, 43 L. J. C. P. 58; see further, ABOUT (as to the distinction between words of estimation and words of contract): AFTER; AT AND AFTER; SAY. Sometimes "from" is used to indicate a point of time, *e.g.* at or after which a certain obligation, etc., begins. Here the first terminal is included or excluded according to the subject-matter of the context (*Williams* v. *Nash*, 1859, 28 L. J. Ch. 886: cp. also *From and after; From henceforth; From the Day of the Date*; and Stroud, *Jud. Dict.*, *ad loc.*; also the later case of *South Staffordshire Tramways Co.* v. *Sickness and Accident Assurance Association*, [1891] 1 Q. B. 402). As to the phrase "*from time to time*," see *Lawrie* v. *Lees*, 1881, 7 App. Cas. 19, and Stroud, *Jud. Dict.*

Frontier.—The boundary of a State. On land it is usually indicated by posts set up at intervals from each other, where not marked

by other physical signs. Seawards the frontier extends to the limit of territorial waters (*q.v.*), and when a river passes between two States, in the absence of immemorial usage in favour of one or the other, the frontier is held to pass through the middle of the river course (see PRESCRIPTION (*Intern. Law*); STRAIT; THALWEG; VENEZUELA FRONTIER CASE).

Front Main Wall.—See LONDON (COUNTY), *Buildings.*

Frost.—1. Where performance by the shipowner of a contract of carriage by sea is prevented or delayed by frost, the delay or non-performance is treated as excused by the act of God or *vis major*, where the frost is extraordinary or its effect could not have been prevented by any reasonable amount of care and foresight (*Siordet* v. *Hall*, 1828, 4 Bing. 607; 29 R. R. 651). But in such contracts and marine insurance policies frost has been held not to be a "peril of the sea" (Scrutton on *Charter-Party*, 3rd ed., 177).

In charter-parties, apart from express exceptions, the charterer is not protected against the prevention by frost or ice from transmitting a cargo to the port of loading (*Kearon* v. *Pearson*, 1861, 31 L. J. Ex. 1; *Hudson* v. *Ede*, 1867–68, L. R. 2 Q. B. 566; 3 Q. B. 412; *Coverdale* v. *Grant*, 1885, 9 App. Cas. 470). But he is not liable for delays caused after loading by frost or ice, the risk of which falls on the shipowner (*Pringle* v. *Mollet*, 1840, 6 Mee. & W. 80). It is usual in charter-parties to insert an exception in favour of the charterer against loss of time in loading through frost or ice (see Scrutton, *Charter-Party*, 3rd ed., 99).

The question of interference by frost with other contracts does not seem to have been considered except in the case of the quasi-statutory contracts made by water companies and gas companies.

Water companies when their Acts incorporate secs. 36, 37, 42 of the Water Works Clauses Act, 1847 (10 & 11 Vict. c. 17), and sec. 13 of the Water Works Clauses Act, 1863 (26 & 27 Vict. c. 103), are excused if prevented by frost from supplying water for domestic or public or other purposes or extinguishing fires. A similar provision is made as to constant supply in the districts of the London water companies by the Metropolis Water Acts, 1871 (34 & 35 Vict. c. 113, s. 15) and 1897 (59 & 60 Vict. c. 56). The inability to supply does not appear to defeat the right of the water company to recover the rate chargeable for the supply not provided, which is not apportionable or divisible.

Gas companies appear also to be excused from supply in case of *exceptional* frost, which is regarded as *vis major*; but the inability does not appear to disentitle them to recover the contract price where fixed otherwise than by meter (*Richmond Gas Co.* v *Richmond Corporation*, [1893] 1 Q. B. 56).

2. The law as to damage arising to the person or property of others in consequence of frost has not been very clearly settled. Injury due to escape of water from a fire-plug caused by an extraordinary frost has been held not to be actionable if reasonable precautions had been taken against ordinary frosts (*Blyth* v. *Birmingham W. W.*, 1856, 11 Ex. Rep. 781; *Bayley* v. *Wolverhampton W. W.*, 1863, 30 L. J. Ex. 57; *Stoggles* v. *New River W. Co.*, 1862, 11 W. R. 234; 1863, 13 W. R. 413). But where premises to which the public or individuals are invited or have access are rendered unsafe by frost, the owner would appear to be liable for consequent injury, unless he took reasonable care to remove the risk (*Shepherd* v. *Midland Rwy. Co.*, 1870, 25 L. T. 879).

3. It is lawful in the case of frost to lay sand or other materials on streets in towns to prevent accidents, or litter or other suitable material to prevent the freezing of water in pipes, if it is removed as soon as occasion for it ceases (10 & 11 Vict. c. 89, s. 28; 38 & 39 Vict. c. 55, s. 171; and in London, 54 & 55 Vict. c. 91, s. 16 (5)). In London, water companies may set up standpipes in the street in case of frost, subject to the approval of the surveyor of the sanitary authority (57 Geo. III. c. xxix. s. 21).

Fruit.—The sale of fruit is not subject to any special regulations other than those applicable to other articles of food. See ADULTERATION; FOOD.

Packages containing foreign fruit must be marked with the country of origin under the Merchandise Marks Act, 1887 (51 & 52 Vict. c. 28). For breaches of the Act the Board of Agriculture is empowered to prosecute (57 & 58 Vict. c. 19).

Hawking.—And fruit may be hawked or peddled without a licence, under 35 & 36 Vict. c. 96, s. 23, or 51 & 52 Vict. c. 33, s. 3 (2) (*b*).

Offences.—Theft of growing fruit is punishable under secs. 32, 33, 36, 37 of the Larceny Act, 1861, and criminal damage to fruit by secs. 20–23, 53 of the Malicious Damage Act, 1861.

Rates, Tithes, and Taxes.—As to tithes, rates, and taxes on fruit gardens, see MARKET GARDEN; TITHES.

Fruit Pickers.—By sec. 314 of the P. H. Act, 1875, as amended by 45 & 46 Vict. c. 23, s. 1, district councils are empowered to make and enforce by-laws to secure the decent lodging and accommodation of persons engaged in picking fruit, hops, and vegetables. The by-laws must be in accordance with secs. 182–186 of the Act of 1875, and be confirmed by the Local Government Board.

There is no available record as to the extent to which this power has been exercised; but the expediency of exercising it was much insisted on in consequence of an outbreak of typhoid fever in Kent in 1897 attributed to pollution of a water supply by hop-pickers.

Factories.—By sec. 56 of the Factory and Workshops Act, 1878, women are allowed to work fourteen hours a day in a factory for making preserves from fruit; and by sec. 2 of the Act of 1891 overtime is allowed in a jam factory or like business in June, July, August, and September, for the process of cleaning and preparing fruit, so far as it is necessary to prevent the spoiling of the fruit on its arrival at the factory.

Fuel.—See ESTOVERS.

Fugitive Offenders.—1. Fugitives from English justice are arrested within England by the modes described under ARREST; and see HUE AND CRY.

The complex construction of the British Empire, and its division into different areas, some almost autonomous, and all, in respect of their judicatures, almost as independent as foreign States, has led to the development of a complicated system for the extradition of fugitives both from British and foreign justice.

2. The Habeas Corpus Act, 1679 (31 Chas. II. c. 2, s. 15), specially saves the right to return for trial to Scotland or Ireland, or any island or

foreign plantation of the Crown, any person accused of having there committed a *capital* offence. No statutory or common law process for effecting such extradition seems to have existed prior to the present reign (*Kimberley's* case, 1 Stra. 848). By legislation of the present reign this anomalous condition of affairs has been altered, both as to the British islands and other British possessions.

When a person accused of an offence in one part of the "British islands" (52 & 53 Vict. c. 63, s. 18 (1)) is in another part of those islands, he is made amenable to justice by the following procedure:—

English Warrants.—Warrants issued in England for an indictable offence by any competent authority may be executed in Ireland after indorsement by a judge of the High Court there, or of a justice of the peace for the Irish county or place, or a chief deputy or assistant inspector of constabulary in which the arrest is made. The indorsement has the effect of an authority to the persons to whom the warrant was directed, and to the Irish peace officers for such Irish county or place, to convey their prisoner to the part of England in which the warrant issued (11 & 12 Vict. c. 42, s. 12; 14 & 15 Vict. c. 93, ss. 29, 30).

Similar provisions are made as to backing and executing English warrants in Scotland (11 & 12 Vict. c. 42, s. 14), in the Isle of Man and the Channel Islands (11 & 12 Vict. c. 42, s. 13; 14 & 15 Vict. c. 55, s. 18). These provisions extend to all warrants of arrest for an offence issued by English Courts of summary jurisdiction (11 & 12 Vict. c. 43, ss. 3, 37); and all process of an English Court of summary jurisdiction, except for recovery of a civil debt or in bastardy proceedings, can be executed in Scotland under 44 & 45 Vict. c. 24, ss. 4, 5, 8, Sched. (*Berkeley* v. *Thompson*, 1885, 10 App. Cas. 45).

Scotch warrants issued by a lord commissioner of justiciary, sheriff, or his depute or substitute, or a justice of the peace, are backed and executed in England under 11 & 12 Vict. c. 42, s. 15; in Ireland under that section as modified by 14 & 15 Vict. c. 93, ss. 29, 30; and in the Isle of Man and the Channel Islands under 31 & 32 Vict. c. 107, s. 4.

The provisions as to execution in England extend to all Scotch warrants issued by any person under the Summary Procedure (Scotland) Act, 1864 (27 & 28 Vict. c. 53, s. 9), and all process not of merely civil jurisdiction issued by a Scotch Court of summary jurisdiction and backed in England (44 & 45 Vict. c. 24, ss. 4, 5, 8, Sched.).

Prior to 1773 (13 Geo. III. c. 31) great difficulties arose on the Border owing to the lack of efficient process for arresting offenders who offended on one side and took refuge on the other. At present special powers of arrest outside their own county are given to the police of the Border counties of England and Scotland (20 & 21 Vict. c. 72, s. 11).

Irish warrants are backed and executed in England under 11 & 12 Vict. c. 42, s. 14; in Scotland under s. 15, as modified by 14 & 15 Vict. c. 93, s. 27 (3); and in Man or the Channel Islands under 14 & 15 Vict. c. 93, s. 27 (3), and 31 & 32 Vict. c. 107, s. 4.

Irish warrants before being backed in England or elsewhere are usually indorsed by the chief inspector of constabulary, or a deputy or assistant inspector (14 & 15 Vict. c. 93, s. 27 (3); 30 & 31 Vict. c. 19 s. 1).

Channel Islands warrants are backed and executed in England under 11 & 12 Vict. c. 42, s. 13; in Scotland under 31 & 32 Vict. c. 107, s. 4; and in Ireland under 14 & 15 Vict. c. 93, s. 29, on indorsement by the chief inspector or a deputy, or assistant inspector of Irish constabulary, or a justice.

Manx warrants are backed and executed in England under 11 & 12 Vict. c. 42, s. 13, and in Ireland under 14 & 15 Vict. c. 93, s. 29, after indorsement by a chief or deputy, or assistant inspector of constabulary, or a justice.

Possessions abroad.—Fugitives from the justice of the British islands to other parts of the empire or to countries to which the Foreign Jurisdiction Acts have been applied, or *vice versâ*, and from one British possession or group of possessions to another such possession or group, are dealt with under the Fugitive Offenders Act, 1881 (44 & 45 Vict. c. 69), which applies to offences committed before its passing or application to a particular place (s. 38).

Part I. of the Act empowers the arrest on an indorsed or provisional warrant (ss. 1, 2, 3, 26, 37) of persons found in one part of H.M.'s dominions who are accused of committing in another part an offence punishable on conviction by imprisonment for twelve months or more with hard labour (s. 9), or a convict under British sentence who is at large before its termination (s. 34). The fugitive on arrest is brought before a magistrate, and if there is evidence to raise a strong or probable presumption of guilt, is committed and returned to the *locus delicti commissi* (ss. 5, 6); but is entitled to challenge the legality of his detention by *habeas corpus* if the charge is frivolous or his retention would be unjust, or if not conveyed abroad within a month of committal, to be discharged (ss. 6, 7, 10). On arrival at the *locus delicti* he must be tried within six months of arrival, and if not so tried or if acquitted on trial is entitled to have his passage paid back to the place at which he was taken or to which he was going when arrested (s. 8).

Secs. 21, 29 deal with the taking of evidence and punishment of perjury, and sec. 24 with the issue of search warrants.

The jurisdiction to issue warrants may be exercised in England and Ireland by any justice, in Scotland by a sheriff or sheriff-substitute, and in Man and the Channel Islands by any person who has power to issue warrants for arrest of offenders. The hearing under sec. 6 must, in England, Man, and the Channel Islands, be at Bow Street Police Court, and in Ireland before a police magistrate for the Dublin district, and in Scotland by the Sheriff of Edinburgh (s. 30). The hearing magistrate or a superior Court appear to have power to admit the accused to bail.

Secs. 25, 28, 29, 30 provide for the conveyance of the fugitives and their recapture on escape.

Intercolonial Extradition.—Part II. of the Act (ss. 12–19, 31) deals with the intercolonial backing of warrants, and where applied gets rid of the need of a preliminary inquiry, under Part I., at the place of arrest; and empowers the conveyance of witnesses from colony to colony within the group (s. 15). The Courts of a colony may refuse to return a prisoner within this part if the offence is trivial (*Ex parte Counsel*, 1887, 8 N. S. W. Rep. Law 315; and see *Kurtz* v. *Aitken*, 9 N. Z. L. R. 673).

This part has been applied *in toto* to the following groups of colonies:—Australasia, *i.e.* the Australian colonies, New Zealand, and Fiji (Order in Council, Aug. 23, 1883, St. R. & O., Revised, vol. iii. p. 956); South Africa (Order in Council, Nov. 17, 1888, *ibid.* p. 960; and 1891, St. R. & O. (1891) 307); Asiatic possessions, *i.e.* East Indies, Ceylon, and Straits Settlements as one group, and Straits Settlements, Hong-Kong, and Labuan as another (Order in Council, Dec. 12, 1885, St. R. & O., Revised, vol. iii. pp. 958, 959). And it is applied with certain limitations to West Indian colonies by Order in Council of Nov. 29, 1884 (St. R. & O., Revised, vol. iii. p. 957).

Foreign Jurisdiction Orders.—Under the powers given by sec. 36, the Act

has been applied wholly or in part to areas in which the British Crown has foreign jurisdiction by Orders in Council, which are listed under the title FOREIGN JURISDICTION.

The dates of the orders are—Africa, general (1889), East (1897), South (1891); China, Japan, and Corea, 1884; Cyprus, 1881; Turkey, including Egypt, 1882; Morocco, 1889; Pacific Ocean, 1893; Persia, 1889; Persian Coasts and Islands, 1889; Siam, 1889; Zanzibar, 1897.

The orders supply the place of Extradition Acts and Treaties with the countries to which they apply, so far as relates to the surrender of fugitives from British justice.

Offences in Foreign States.—Fugitives from foreign justice found in British dominions and Cyprus are dealt with under the Extradition Acts (see EXTRADITION); and the surrender by foreign States of fugitives from the justice of any part of the British Empire is obtained under the treaty with the State in which they have taken refuge; or in some cases independently of treaty by an exercise of executive power by such foreign State (see *Sinclair* v. *Lord Advocate*, 1890, 17 Rettie (Justiciary Cases), 38). The fact that a fugitive from British justice has been brought from abroad without compliance with existing treaties, or in violation thereof, or by kidnapping, is no defence on his trial in H.M.'s dominions (*Sinclair's* case, *supra*; *Ex parte Scott*, 1829, 9 Barn. & Cress. 446; and cp. *Ex parte Brown*, U.S., 1886, 28 Fed. Rep. 653; *In re Parisot*, 1889, 5 T. L. R. 344). On a trial for an offence not disclosed by the papers on which a surrender has been made under a treaty, sec. 19 of the Extradition Act, 1870, seems to deprive the British Courts of jurisdiction. But the mode in which exception should be taken is unsettled. It seems to be under "not guilty," or by motion to arrest judgment; and not by plea to the jurisdiction (*R.* v. *Balfour*, 1895, 30 L. J. 615). The views of American lawyers on this subject are stated in *U.S.* v. *Rauscher*, 1886, 119 U.S. 407.

Supplementary.—Secs. 20, 21, 23, 33, 35, 36 of the Act of 1881 provide for the cases in which an offence may be tried in two or more British possessions, *e.g.* when committed on the common boundary, or on a journey, if the offender is a British subject, or the offence can be shown to have been committed within British territory. They also provide for the mode and incidents of trial.

Sec. 32 empowers colonial legislatures to frame machinery for carrying the Act into effect in their own territory.

Fugitive Slave.—A slave escaping to this country or to any British possession becomes *ipso facto* free, and will not be surrendered to his former owner. The same principle applies to slaves escaping to British ships on the high seas which are theoretically regarded as detached portions of the British Empire. (See EXTERRITORIALITY.)

This would not apply to a British ship in the territorial waters of the State from which the slave has escaped, and the question has arisen whether it applies to a British public ship in the territorial waters of such a State. Instructions issued by the British Admiralty, dated December 5, 1875, restricting the protection granted to fugitive slaves by the British flag were warmly criticised, and gave rise to the appointment of a Commission in 1876—

to inquire into and report upon the nature and extent of such international obligations as are applicable to questions as to the reception of fugitive slaves by Your Majesty's ships in the territorial waters of foreign States, and into all instructions from

time to time issued to the commanders of Your Majesty's ships relative thereto; and whether any engagements into which this country has entered bear upon such questions; and whether, in case such obligations, instructions, or engagements shall appear to be at variance with the maintenance by Your Majesty's ships and officers in whatever waters they may be, of the right of personal liberty, any and what steps should be taken to secure for them greater freedom of action in this respect.

The recommendations of the Commission led to the withdrawal of the instructions of 1875, which were superseded by the following:—

1. In any case in which you have received a fugitive slave into your ship and taken him under the protection of the British flag, whether within or beyond the territorial waters of any State, you will not admit or entertain any demand made upon you for his surrender on the ground of slavery.

2. It is not intended, nor is it possible, to lay down any precise or general rule as to the cases in which you ought to receive a fugitive slave on board your ship. You are, as to this, to be guided by considerations of humanity, and these considerations must have full effect given to them, whether your ship is on the high seas or within the territorial waters of a State in which slavery exists; but in the latter case you ought, at the same time, to avoid conduct which may appear to be in breach of international comity and good faith.

3. If any person within territorial waters claims your protection on the ground that he is kept in slavery contrary to treaties with Great Britain, you should receive him until the truth of his statement is examined into. This examination should be made, if possible, after communication with the nearest British consular authority, and you should be guided in your subsequent proceedings by the result.

4. A special report is to be made of every case of a fugitive slave received on board your ship.

Full.—As to cheques "in full of all demands," see vol. i. p. 70. As to "full and complete cargo," see vol. ii. pp. 374, 486. As to "full annual rent or value," "houses rateable to the relief of the poor," see *Rose* v. *Watson*, [1894] 2 Q. B. 90). As to "full and valuable consideration" under the Georgian Mortmain Act, see vol. ii. p. 464. As to other uses of the term, see Stroud, *Jud. Dict.*

Funds.—The name is applied generally to all the funded debts of the Imperial Government, that is to say, debts (or stocks) of which the capital is not repayable, or is repayable only after long periods from the original loan. Where the capital is not repayable, the funds are in fact perpetual annuities. Where it is repayable by instalments of principal and interest, the funds are terminable annuities. The unfunded debt principally consists of money due upon EXCHEQUER BILLS at short dates (see as to these, 29 & 30 Vict. c. 25). Sometimes the unfunded debt is included under the general title "Funds" (*e.g.* in Burdett).

The Funds consist of the following securities:—

(1) The 2¾ per cent. Consols, formed on the conversion of the bulk of the older 3 per cents. (below (2)), under the National Debt Conversion Act, 1888 (51 & 52 Vict. c. 2). The interest upon these will be 2½ per cent. after 5th April 1903. The stock is not to be redeemed before 5th April 1923. The dividends on this and the other stocks enumerated below are payable on 5th January, 5th April, 5th July, and 5th October in every year. There is a small amount, about £4,600,000, of other 2¾ per cent. Consols formed on the attempted conversion of 1884 under the Act 47 & 48 Vict. c. 23. This is not to be redeemed before 5th January 1905.

(2) The 3 per cent. Consols, first formed in 1751, and the Reduced 3 per cent. Annuities formed in 1749 by the consolidation of older stocks,

and redeemed as above stated in 1888. See the National Debt Act, 1870 (33 & 34 Vict. c. 71).

(3) The 2½ per cent. Perpetual Annuities originally created in 1853 (16 Vict. c. 23). Additions were made to this stock by conversions under the Act of 1884 (*supra*). The stock is not to be redeemed before 5th January 1905.

(4) Terminable Annuities created under various Acts (see Burdett, ed. 1896, p. 67).

There are a number of other Government stocks of small amounts issued under special Acts upon the occasions of loans for particular purposes; details of these will be found in Burdett, ed. 1896, pp. 64–75.

The law of the NATIONAL DEBT will be dealt with under that title. See Fenn on the *Funds*; Burdett, *ubi cit.*; *The Stock Exchange Year-Book*, 1897, p. 15; and the title National Debt in the Index to the Statutes.

Funds in Court.—See PAY-OFFICE.

Funeral Expenses.—See BURIAL; CREMATION; EXECUTORS AND ADMINISTRATORS; FRIENDLY SOCIETIES.

Funerals, Offences at.—See BRAWLING; BURIAL GROUND.

Furious Driving.—See CYCLING; DRIVING. If death is caused by furious driving the offender is liable to conviction for manslaughter. See MANSLAUGHTER. Bicycles and tricycles fall within the provisions of the Highway Act, 1835 (*Taylor* v. *Goodwin*, 1879, 4 Q. B. D. 228), and sec. 35 of the Offences against the Person Act, 1861 (*R.* v. *Parker*, 1895, 30 L. Jo. 718; 59 J. P. 793).

Furious driving in towns is punishable under sec. 28 of the Towns Police Clauses Act, 1847 (10 & 11 Vict. c. 89), which is incorporated in the Public Health Act, 1875 (by s. 171).

Furlough.—Leave of absence from duty granted to soldiers; the length of time and conditions being stated on the furlough paper. The soldier remains under orders, and if, without leave, he quits the place to which he has permission to go, or if he disguises or conceals himself so that orders cannot reach him, or otherwise so acts as to furnish proof of an intention not to return to duty, he may be tried for desertion (*q.v.*) By sec. 173 of the Army Act, 1881 (44 & 45 Vict. c. 58), a soldier who is detained by sickness, or other casualty, may, if there is not any officer in the performance of military duty of the rank of captain, or of higher rank, within convenient distance of the place, obtain an extension of furlough for not more than a month, from any justice of the peace who is satisfied of the necessity of such extension. The justice must immediately by letter certify as to the extension and the cause thereof to the commanding officer of the soldier or to a Secretary of State.

If the soldier (s. 27) makes a wilfully false statement to any military officer or justice in respect of his prolongation of furlough, he is on

conviction by court-martial liable to imprisonment or such less punishment as is provided by sec. 44.

In the navy, absence beyond the period of leave granted may also become evidence of desertion in such circumstances as mentioned above. By sec. 23 of the Navy Discipline Act, 1866 (29 & 30 Vict. c. 109), a person who (without being guilty of desertion or of improperly leaving his ship or place of duty) is absent without leave, is liable to imprisonment for not exceeding ten weeks with or without hard labour, and forfeiture of wages, and other benefits as prescribed by the Admiralty Regulations. No provision is made in the Naval Acts for extension of furlough by the intervention of a justice in case of sickness, etc., as above stated for soldiers. See ARMY; NAVY.

[*Authorities.—Manual of Military Law*, War Office, 1894; Thring, *Criminal Law of the Navy*.]

Furnaces.—See CHIMNEYS; LONDON *Buildings*.

Furnished Lodgings.—See APARTMENTS; LODGER; LODGING-HOUSE.

Furniture.—See BILLS OF SALE; FIXTURES; HEIRLOOMS; ORDER AND DISPOSITION; HIRING AGREEMENT.

Furnival's Inn.—See INNS OF COURT.

Further Assurance.—As to the covenant for, see vol. iii. p. 366. See also MORTGAGE and SETTLEMENTS. The covenant for further assurance runs with the land. As to *covenants running with the land*, see vol. iv. p. 19.

The covenants for seisin, right to convey, quiet enjoyment, freedom from incumbrances, and further assurance constitute, in the order mentioned, the ordinary covenants for title as inserted in a conveyance. The covenant for further assurance is to the effect that the vendor and his heirs, and all and every person or persons claiming by, from, through, under, or in trust for him or them, will from time to time, and at all times, at the request and cost of the purchaser, or any person deriving title under him, execute and do all such lawful assurances and things for further and more perfectly assuring the subject-matter of the conveyance to the purchaser, and those deriving title under him, as by him or them, or any of them, shall be reasonably required.

This covenant is one of great value to the purchaser, for "it relates both to the title of the vendor and to the instrument of conveyance to the vendee; and operates as well to secure the performance of all acts for supplying any defect in the former as to remove all objections to the sufficiency and security of the latter" (Pratt on *Covenants*, 340). Express covenants of this kind are now of rare occurrence, conveyancers relying on the provisions of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41) (see CONVEYANCING ACTS). In a conveyance for valuable consideration (including mortgages) by a person who conveys, and is expressed to convey, as "beneficial owner," there

is deemed to be included, and by virtue of sec. 7 of the Act implied, a covenant for (*inter alia*) further assurance by the person, or by each person who so conveys, as far as regards the subject-matter, or share of subject-matter conveyed by him with the person or persons to whom the conveyance is made. And in a conveyance by way of settlement a more limited covenant (than in the case of a "beneficial owner") for further assurance is implied by virtue of the same section where a person is expressed to convey as "settlor." Similarly, where a person *directs* as *beneficial owner* that a third party shall convey, the person giving the direction is deemed to convey as beneficial owner within the section the subject-matter conveyed by his direction, and a covenant on his part to the like effect is implied accordingly (see Conveyancing Act, 1881, s. 7 F. (2)). A conveyance under this section includes a deed (but not a demise by way of lease at a rent or any other customary assurance) conferring the right to admittance to copyhold or customary land. The covenant for further assurance implied by the section is therein set out at length, and may be referred to for the form of such covenants. A precedent will also be found in Wms. *Real Property*, Appendix D.

The covenant for further assurance runs with the land, and as to the benefit of the covenants implied by the Conveyancing Act, it is by subsec. (6) of sec. 7 enacted that it shall be incident to the estate and interest of the implied covenantee, and shall be enforceable by every person in whom that estate or interest is for the whole or any part thereof from time to time vested. See generally as to the benefit of these covenants, *David* v. *Sabin*, [1893] 1 Ch. 523.

By virtue also of certain other statutes, of which the Lands Clauses Consolidation Act, 1845, is the most important, a covenant for (*inter alia*) further assurance is implied by the use of the word *grant* by the conveying party in the conveyance. As to this, and also the old law on the implied covenants for title created by the use of that word, see GRANT, and Hargrave and Butler's note to *Co. Lit.* s. 384 *a*.

As to the liability of the covenantor under his covenant (whether express or implied), it may be stated generally that in covenanting to do all such acts as may be reasonably required for the further assurance of the property conveyed, he undertakes to perfect, so far as shall at any time be in his power, the title he professes to give. He does not therefore commit a breach of his covenant if he is prevented from executing such further assurance by the act of God; and, in any case, he is entitled to reasonable time. It is doubtful whether, under a covenant for further assurance, a purchaser can subsequently demand a covenant for production of title deeds which he has originally neglected to have inserted in his conveyance (cp. the cases *Hallett* v. *Middleton*, 1826, 1 Russ. 243; and *Fain* v. *Ayers*, 1826, 2 Sim. & St. 533; note to 1 Russ. 259; 25 R. R. 264).

Covenants for further assurance are to be construed strictly, and unless there are words in a conveyance to show that it was intended that such a covenant shall extend to enlarging the estate conveyed, and to barring an interest in persons other than the grantor, the Courts will not decree specific performance (*Davis* v. *Tollemache*, 1856, 2 Jur. N. S. 1181). But where a tenant in tail in remainder barred his estate tail without the protector's consent, and then conveyed all his estate and interest to a purchaser, covenanting at the same time "to execute every such disentailing or other assurance as might be necessary to vest the premises in the purchaser," the Court, on the death of the protector of the settlement, decreed specific performance of the covenant in favour of the purchaser (*Bankes* v. *Small*, 1887, 34 Ch. D. 716).

In spite of the provisions of the Conveyancing Act, 1881, before noticed, for implying a covenant for further assurance, the circumstances of the case may sometimes render it expedient and necessary to insert an express covenant to that effect in a conveyance (*e.g.* in the case of such a conveyance as is referred to in *Bankes* v. *Small*, *supra*; or where the property is situated abroad).

Further Consideration.—Where, on the hearing of a motion for judgment, or on a motion for a new trial, the Court is of opinion that it has not sufficient materials before it to enable it to give judgment, it may direct the motion to stand over for further consideration, and direct such issues or questions to be tried or determined, and such accounts and inquiries to be taken and made as it may think fit (R. S. C. 1883, Order 40, r. 10).

Order 36, r. 39, originally provided that the judge might, at or after the trial, direct judgment to be entered for any or either party, or adjourn the case for further consideration, or leave any party to move for judgment. The present rule, however, which was introduced in 1892, makes it obligatory on the judge at the trial to direct judgment to be entered at or after the trial, and no motion for judgment is necessary to obtain such judgment. This latter provision applies mainly to actions in the Queen's Bench Division in which there has been a trial with a jury. In the Chancery Division, on the other hand, an action is usually heard on motion for judgment. In such cases, where it appears that in order to do complete justice it is necessary that further information should be furnished to the Court, the judgment directs such accounts and inquiries as the circumstances require, to be taken and made, and adjourns further consideration of the action, which takes place after the master has made his certificate answering such accounts and inquiries. Further consideration, therefore, is mainly confined to cases in the Chancery Division, and will be so considered in this article.

Setting Down in Chancery Division.—When any cause or matter in the Chancery Division has been adjourned for further consideration, the same may, after the expiration of eight days, and within fourteen days from the filing of the master's certificate, be set down in the cause book for further consideration, on the written request of the solicitor for the plaintiff or party having conduct of the proceedings, and after the expiration of such fourteen days, on the written request of the solicitor for the plaintiff or for any other party. The order adjourning further consideration and an office copy of the master's certificate must be produced on setting down. The cause or matter when set down will not come on for hearing until after the expiration of ten days from the day of setting down (Order 36, r. 21, taken from 21 C. O., r. 10).

Where Proceedings originated in Chambers.—Where a matter originating in chambers has, at the hearing, been adjourned for further consideration in chambers, it may be brought on for hearing on summons after the expiration of eight days and within fourteen days from the filing of the master's certificate (Order 55, r. 72). It is submitted that the clear language of the rule shows that it was not intended to apply to all proceedings originating in chambers in which further consideration is reserved, but only where it is reserved to be heard in chambers. Difficulty is often caused by losing sight of this distinction. For instance, where an originating summons for general or partial administration has been

issued under the provisions of Order 55, r. 3, if the order does not expressly reserve further consideration in chambers, the hearing will take place in Court, unless the case can be brought within the provisions of Order 55, r. 2 (16) (see, however, *contra*, *In re Glasson*, *Glasson* v. *Glasson*, 1893, W. N. 85, in which a contrary view was expressed by Kekewich, J. The case is not followed in the other chambers).

Order 55, r. 2 (16), provides that applications for orders on further consideration may be heard in chambers, where the order to be made is for the distribution of an insolvent estate, or for the distribution of the estate of an intestate, or for the distribution of a fund among creditors or debenture-holders. With regard to this rule, it may be noticed that, even in cases within it, if there be circumstances of exceptional difficulty, the further consideration may be adjourned to be heard in Court (*In re Barber*, *Burgess* v. *Vinnicombe*, 1886, 31 Ch. D. 665).

Notice of Setting Down.—Notice of setting down the action on further consideration should be given to all parties to the action, including those who have been served with notice of judgment and have appeared under Order 16, r. 41. But where such parties have not appeared, notice need not be given to them (*In re Rolfe*, *Tyson* v. *Johnson*, 1894, 70 L. T. 624), except where an order is sought against them personally (*In re Rees*, *Rees* v. *George*, 1880, 15 Ch. D. 490). Purchasers of real estate sold under order of the Court, and parties who have obtained stop orders on a fund proposed to be dealt with by the order, must be served. A purchaser who has obtained his conveyance will not be allowed his costs if he appears (*Barton* v. *Latour*, 1854, 18 Beav. 526; *Noble* v. *Stow*, 1861, 30 Beav. 272).

Evidence.—As a rule, the Court does not admit evidence filed after the master's certificate, but under Order 37, r. 1, such evidence may be admitted if the circumstances of the case require it (*May* v. *Newton*, 1887, 34 Ch. D. 347; and see *In re Michael*, *Dessau* v. *Lewin*, 1885, 52 L. T. 342; *In re Revill*, *Leigh* v. *Rumney*, 1886, 55 L. T. 542). Where it is intended to read evidence on the hearing, notice of intention to use it must be given (*In re Chennell*, *Jones* v. *Chennell*, 1878, 8 Ch. D. 492). Whether, where there is no summons to vary the certificate, the affidavits referred to in the certificate can be read in Court, *quære* (*In re Brier*, *Brier* v. *Evison*, 1884, 26 Ch. D. 242).

Absence of Summons to vary.—If any party is dissatisfied with the finding of the master, he should issue a summons to vary the certificate, and will not be heard to object to it unless he has adopted that course (*Smith* v. *Armstrong*, 1856, 6 De G., M. & G. 150; *Lamb* v. *Orton*, 1859, 8 W. R. 111). Where a summons to vary has been issued, it will be adjourned into Court to come on with the hearing on further consideration (*Crompton* v. *Huber*, 1855, 3 W. R. 347; *Hudson* v. *Carmichael*, 1854, 18 Jur. 852).

The Hearing.—Interest may be charged on balances found due from an accounting party, although the question has not been reserved by the original judgment (Daniell's *Ch. Pr.* pp. 1163, 1164, and cases there cited). But where there was no fiduciary relationship between the parties, the Court refused, on further consideration, to charge the defendants with interest on sums found due from them (*Phillips* v. *Homfray*, 1890, 44 Ch. D. 694). Wilful default will not be charged on further consideration where the original judgment has not been made on that footing (*Laming* v. *Gee*, 1878, 10 Ch. D. 715), unless it has been alleged and a case has been made for it on the pleadings (*Barber* v. *Mackrell*, 1879, 12 Ch. D.

558; *In re Symons, Lake* v. *Tonkin*, 1882, 21 Ch. D. 757; *Mayer* v. *Mayer*, 1878, 8 Ch. D. 424, explaining *Job* v. *Job*, 1877, 6 Ch. D. 562). Generally, matters raised on the pleadings, but not considered at the original hearing, and in respect of which there is no reservation in the judgment, will not, as a rule, be dealt with on further consideration (*Passingham* v. *Sherborne*, 1839, 9 Beav. 424; *Morgan* v. *Morgan*, 1849, 13 Beav. 441; *Legrand* v. *Whitehead*, 1826, 1 Russ. 309; 25 R. R. 56; and see *Hughes* v. *Jones*, 1861, 3 De G., F. & J. 307).

Costs.—Further consideration is the stage of the action at which costs are usually disposed of, so far as they were left open at the original hearing. An order on further consideration which directs payment of costs in a particular way, and does not reserve subsequent further consideration, nor reserve the question how the costs are ultimately to be borne, ought to be treated as final (*In re Roper, Taylor* v. *Bland*, 1890, 45 Ch. D. 126, per Fry, L.J., at pp. 138, 139, differing from the majority of the Court, who in the circumstances of the case considered the directions as to costs contained in the order on further consideration as having been given for convenience only, and altered the method in which the costs were directed to be borne).

Appeal.—By Order 58, r. 15 (*a*), it is provided that the time for appeal against an order made on the further consideration of a cause, and on the hearing of a summons to vary the certificate on which such order is made, shall be the same as the time for appealing against the order on further consideration. The object of the rule was to get rid of the inconvenience of having two different times allowed for appealing from two different parts of the same order, and it was held to apply where orders on the summons to vary and on the further consideration were drawn up separately (*Marsland* v. *Hole*, 1888, 40 Ch. D. 110).

[*Authorities.*—Daniell's *Ch. Pr.*, 6th ed., pp. 1154–1166; Seton's *Judgments and Orders*, pp. 314–317.]

Furze.—This plant is also described as gorse or whin.

1. The right to cut it for fodder or litter on common lands has been established in several cases, though such right does not come under ESTOVERS (see *Smith* v. *Brownlow* (*Earl*), 1869, L. R. 9 Eq. 241; *Warwick* v. *Queen's College*, 1871, L. R. 6 Ch. App. 716; *De la Warr* (*Earl*) v. *Miles*, 1881, 17 Ch. D. 538).

2. Setting fire to furze is punishable under sec. 17 of the Malicious Damage Act, 1861. See ARSON. As to other offences, see FERN.

Future.—As to the principal applications of this term in law, see Stroud, *Jud. Dict.* As to meaning of "future goods," see SALE OF GOODS.

Read as "former" (*Pasmore* v. *Huggins*, 1855, 21 Beav. 103).

As to covenants to settle "future" property, see *In re Garnett*, 1886, 33 Ch. D. 300; *In re Michell's Trusts*, 1878, 9 Ch. D. 5; *Graffley* v. *Humpage*, 1838, 1 Beav. 46.

A person who agrees to pay commission to an agent upon his subletting his business "at any future date," means subletting within a reasonable time and not indefinitely. What is a reasonable time is a question of fact to be determined in each case (*Houghton* v. *Orgar*, 1885, 1 T. L. R. 653).

The words "or other future estate or interest" in sec. 3 of the Real

Property Limitation Act, 1833, are large enough to comprehend all executory devises (*James* v. *Salter*, 1837, 3 Bing. N. C. 554).

As to the mortgage of a ship and "future cargo," see *Langton* v. *Horton*, 1842, 1 Hare, 549.

[*Authority.*—Stroud, *Jud. Dict.*]

Future and after-acquired Property.—An assignment of property which the assignor may at a future time acquire, is in effect only an agreement to assign it when acquired (*Ramsden* v. *Smith*, 1854, 2 Drew. 298, at p. 306); but as such it is binding in equity (*ibid.* and *Collyer* v. *Isaacs*, 1881, 19 Ch. D. 342, at p. 351; and see *Tailby* v. *Official Receiver*, 1888, 13 App. Cas. 523; and *In re Turcan*, 1888, 40 Ch. D. 5). Agreements of this kind are common in marriage settlements, in the form of a clause providing that after-acquired property (usually that of the wife) exceeding a certain amount in value shall be brought into settlement, the object, in the case of the wife's property, being to exclude the husband's right (*In re Michell's Trusts*, 1878, 9 Ch. D. 5). In the absence of expressions showing a contrary intention, only property the title to which accrues during the coverture will be bound, if the wife survive (*In re Edwards*, 1873, L. R. 9 Ch 97; *In re Coghlan*, [1894] 3 Ch. 76); but it is otherwise if the husband survive (*Fisher* v. *Shirley*, 1889, 43 Ch. D. 290). Questions arising on the construction of such clauses may be divided into those relating (1) to the liability of the person having the disposition of the property; and (2) to the inclusion of the property in the description contained in the agreement. (1) If in an antenuptial settlement there is a covenant by the husband alone, he alone is bound, and only property over which he has or acquires actual power is included; the wife's separate estate is not bound, nor her reversionary interests, nor her choses in action not reduced into possession during the coverture (*In re Macpherson*, 1886, 55 L. J. Ch. 922; *Travers* v. *Travers*, 1840, 2 Beav. 179; *Young* v. *Smith*, 1865, L. R. 1 Eq. 180; *Drury* v. *Scott*, 1840, 4 Y. & C. Ex. 264). This is so, notwithstanding the recital of an agreement to settle (*Young* v. *Smith*, and see *Dawes* v. *Tredwell*, 1881, 18 Ch. D. 354), unless the inference of intention to settle is inevitable (*Caldwell* v. *Fellowes*, 1870, L. R. 9 Eq. 410, where it was held that a joint-tenancy was severed). Even if the covenant is by both husband and wife, or by the wife alone, or if the covenant of the husband alone is preceded by the words "it is agreed," or the like, yet if the husband alone is to perform the settlement, the wife and her property are not bound (*Dawes* v. *Tredwell*, *ubi supra*; but see *Lee* v. *Lee*, 1877, 4 Ch. D. 175). If, however, the settlement is to be made by the wife, or by husband and wife, or by all proper parties, or by parties not specified, then the wife is bound (*Tawney* v. *Ward*, 1839, 1 Beav. 563; *In re de Ros*, 1885, 31 Ch. D. 81; *Butcher* v. *Butcher*, 1851, 14 Beav. 222). If the wife has married while an infant, she may confirm the settlement after coming of age (*Wilder* v. *Pigott*, 1882, 22 Ch. D. 263; *In re Hodson*, [1894] 2 Ch. 421); but if she avoid it, she cannot be put to her election between the after-acquired property and property which she takes under the settlement without power of anticipation (*In re Vardon*, 1885, 31 Ch. D. 275). As to other property, see *Hamilton* v. *Hamilton*, [1892] 1 Ch. 396; and as to avoidance by an infant husband, see *Edwards* v. *Carter*, [1893] App. Cas. 360. With regard to postnuptial settlements, the covenant, though expressed to be by husband and wife, is in effect the husband's alone as to property not settled to her separate use, since the wife is under the disability of coverture (*Anderson*

v. *Abbott*, 1857, 23 Beav. 457), which disability is not removed by the Infants' Settlement Act of 1855 (*Seaton* v. *Seaton*, 1888, 13 App. Cas. 61; cp. *Harle* v. *Jarman*, [1895] 2 Ch. 419). (2) The following kinds of property are excluded, by whomsoever the covenant be made, unless expressly referred to:—Property in which the wife takes a life-interest only for her separate use (*Townshead* v. *Harrowby*, 1858, 27 L. J. Ch. 533); property given for purposes or on trusts inconsistent with the settlement (*Thornton* v. *Bright*, 1836, 2 Myl. & Cr. 230; cp. *In re Crawshay*, [1891] 3 Ch. 176); and property given with a restraint on anticipation (*In re Currey*, 1886, 32 Ch. D. 361). But a mere gift for separate use, and not for life only, will not exclude the property, unless the covenant does so (*In re Allnutt*, 1882, 22 Ch. D. 275); nor the fact that the interest in the property is liable to be divested by the exercise of a power of appointment (*In re Ware*, 1890, 45 Ch. D. 269); nor will an expression of the donor's intention to exclude it (*Scholfield* v. *Spooner*, 1884, 26 Ch. D. 94); and the M. W. P. Act, 1882, does not make property separate property for this purpose (*In re Whitaker*, 1887, 34 Ch. D. 227; *Hancock* v. *Hancock*, 1888, 38 Ch. D. 78). But the covenant does not compel the wife to disentail for the benefit of the settlement (*Hilbers* v. *Parkinson*, 1883, 20 Ch. D. 200); and savings out of income are not bound by it (*Finlay* v. *Darling*, [1897] 1 Ch. 719, not following *In re Bendy*, [1895] 1 Ch. 109). With regard to the question whether the covenant includes property to which the wife is already entitled at the date of the settlement, or only property the interest in which accrues subsequently, there has been a long series of decisions, sometimes conflicting, many of which are referred to in *Williams* v. *Mercier*, 1884, 10 App. Cas. 1. It was there held that property belonging to the wife at the date of the settlement was included; but see *In re Garnett*, 1886, 33 Ch. D. 300; and also *In re Michell's Trusts*, 1878, 9 Ch. D. 5, where it was held that property contingent at the date of the settlement, and having become vested in expectancy during the coverture, was not included. As to the method of calculating whether the property is within the specified amount, cp. *In re Mackenzie's Settlement*, 1867, L. R. 2 Ch. 345; and *Hood* v. *Franklin*, 1873, L. R. 16 Eq. 496. The covenant will not be enforced in favour of a volunteer at his suit (*In re Austis*, 1886, 31 Ch. D. 596); but it may be enforced by one party to it, though it be entirely for the benefit of a volunteer (*Davenport* v. *Bishopp*, 1843, 2 Y. & C. C. 451).

See also BILLS OF SALE; HUSBAND AND WIFE; SETTLEMENTS.

[*Authorities.*—See Elphinstone, Norton, and Clark, *Interpretation of Deeds*, ch. xxxi., 1885; Appendix to Sweet's *Concise Precedents in Conveyancing*, 3rd ed., 1884; Watson's *Compendium of Equity*, vol. i. pp. 660 *sqq.*, 2nd ed., 1886; Key and Elphinstone's *Compendium of Precedents in Conveyancing*, 5th ed., vol. ii. pp. 465 *seq.*, 497, 1897.]

Gain.—As to the meaning of this term in the phrase "an association carrying on business for the acquisition of gain," which must be registered under the Companies Acts, see vol. iii. p. 163. The "gains" of a trade, for purposes of the Income Tax Act, are that which is gained by the trading, for whatever purpose it is used, whether it is gained for the benefit of the community or for the benefit of individuals. Whether the benefit is to be obtained by dividends or by lightening and diminution of public burdens, it is all the same (see *Mersey Docks* v. *Lucas*, 1888, 8 App. Cas. 891). See further, INCOME TAX; PROFITS; and Stroud, *Jud. Dict.*, *s.v.* "Gains."

Gallows.—The structure upon which persons sentenced to death by hanging are executed under English law. There is no statute or executive order prescribing its form. Manorial or quasi-manorial jurisdiction of pit and gallows (*fossa et furca*) existed even before the Conquest. They ceased in England, and the corresponding heritable jurisdictions were abolished in Scotland. The primitive gallows was the bough of a tree, such as the gallows tree still shown in Braemar.

The next form was that of a bracket, delineated in an old eyre roll (1 Seld. Soc. Publ. frontispiece), and perpetuated in Punch and Judy shows. The third form in use at Tyburn in the eighteenth century is delineated in the 11th plate of Hogarth's Apprentices, and that used for pirates at Execution Dock in the 5th plate of the same series. That now in use, which is erected within the prison (see CAPITAL PUNISHMENT), is two upright beams with a cross bar, beneath which is a scaffold containing a drop on which the convict is placed, which is released by mechanism when the fatal noose has been adjusted by the hangman.

Gambia.—A river of Western Africa, the seat of a British colony, which consists of the island of St. Mary, British Combo, Albreda, the Ceded Mile, and McCarthy's Island. The colony was made a separate government in 1888. Under the Orders in Council of 6th April 1889 and 24th November 1891, an appeal lies from the Supreme Court of the Gambia to the Supreme Court of Sierra Leone, and thence to the Queen in Council.

[For conditions of appeal, see PRIVY COUNCIL. See also the *Journal of the Society of Comparative Legislation*, vol. i. p. 378.]

Gambling.—See BETTING-HOUSE; GAMING (AND WAGERING); GAMING-HOUSE.

Gamekeeper.—See GAME LAWS.

Game Laws.

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Game laws are a series of statutes passed with the object of protecting persons who have exclusive or concurrent sporting rights over lands, from the invasion of the lands, and the capture or killing thereon of certain wild animals by trespassers. The cause or excuse for their passing is that wild animals, even when valuable for food, are not the subject of larceny (*R.* v. *Townley*, 1871, L. R. 1 C. C. R. 315), and that it has been deemed desirable to create the special crimes known as "poaching" rather than to apply the law of larceny, so as to vest in owners or occupiers of land an absolute property in wild animals found thereon.

GAME DEFINED.—1. The proper definition of game is that of the Night Poaching Act, 1828 (9 Geo. IV. c. 69), and the Game Act, 1831 (2 Will. IV. c. 32), viz. "hares, pheasants, partridges, grouse, heath or moor game, blackgame, and bustards" (s. 13).

2. The Poaching Prevention Act, 1862 (25 & 26 Vict. c. 114), omits bustard, but adds rabbits, woodcock, and snipe (s. 1).

3. The Game Licences Act, 1860 (23 & 24 Vict. c. 90), further adds quails, landrails, and deer (s. 2). But both these Acts distinguish between game and the added animals.

The eggs of game birds, and of swans, ducks, teal, or widgeon, are protected by sec. 24 of the Act of 1831 and sec. 1 of the Act of 1862.

The general provisions of the Wild Birds Protection Acts, including that of 1896 (59 & 60 Vict. c. 56), are wide enough to cover all these birds and their eggs. Only wild duck, teal, and widgeon are included in the schedule (43 & 44 Vict. c. 35); but under the powers of adding other birds, Orders have been made in many counties (Oke, *Game Laws*, 4th ed., 334), which since 1894 have been published as Statutory Rules, under the Rules Publication Act, 1893. Lists of the Orders (which are all local) are printed in the classified local lists appended to the annual volumes of Statutory Rules and Orders.

Close Time.—*Deer.*—There is no statutory close time for deer. See Fence Months.

Hares and Rabbits.—There is no statutory close time for killing hares or rabbits; but British hares or leverets may not be sold in March, April, May, June, and July, under penalty of 20s. on summary conviction (55 & 56 Vict. c. 8, ss. 2, 3, 4), and the right of an occupier of land to kill hares and rabbits on moorlands and unenclosed lands (not arable) is limited from December 11 to March 31 (43 & 44 Vict. c. 47, s. 1 (3)).

Winged Game.—The close time for winged game is—

Blackgame	Dec. 10 to Aug. 20; but in Devon, New Forest, or Somerset, to Sept. 1, because of the fence months.
Grouse	Dec. 10 to Aug. 12.
Partridges	Feb. 1 to Aug. 31.
Pheasant	Feb. 1 to Sept. 30.
Bustard	March 1 to Sept. 1.

No game may be killed on Sunday or Christmas Day (1831, c. 32, s. 3 *Allen* v. *Thompson*, 1870, L. R. 5 Q. B. 336).

Other Wild Birds.—The close time for all other wild birds is from March 1 till August 1, with power, under the Wild Birds Protection Act, 1896 (59 & 60 Vict. c. 56), to extend the close time, or absolutely prohibit the capture of all wild birds or particular kinds. The Orders issued by the Secretary of State under this power are published as Statutory Rules and Orders. These provisions can be extended to eggs. See Birds.

Sporting Rights.—Under the common law and the forest laws sporting rights were claimed *ratione privilegii*, *i.e.* as a prerogative of or as a franchise derived from the Crown, or *ratione soli* as incidental to the ownership or occupation of land.

The statute-book from the Conquest contains many enactments in furtherance of the royal and private rights of sport, whether in forest, chase, park, warren, manor, or ordinary private land (see Burn, *Justice*, 17th ed., tit. "Game Laws"). But all were swept away in 1828 (9 Geo. IV. c. 69) and 1831 (1 & 2 Will. IV. c. 32), except some provisions now included in the Larceny Act, 1861. See *post*, *Criminal Remedies*.

Before dealing with the statutes in force, it is necessary to indicate

the classes of areas and rights which exist and are preserved for the owners by the provisions of the Acts.

Sporting rights exist *ratione privilegii* in forests and their purlieus, chases, parks, warrens, and manors (*Blades* v. *Higgs*, 1865, 11 H. L. 621).

A forest is a tract of country in which at one time the rights of the Crown were paramount and excluded the common law as to game, sport enclosures, and commons (*Commissioners of Sewers* v. *Glasse*, 1866, L. R. 19 Eq. 134). In a forest no one may hunt without licence of the Crown, or since 10 Geo. IV. c. 50 from the Commissioners of Woods and Forests. Forests, so far as they still exist, are governed by special officers, and have special Courts. See DEAN FOREST; NEW FOREST; FORREST.

Purlieus are lands disafforested (*q.v.*) but adjacent to a forest in which the Crown had the sole right to beasts of forest, chase, and warren, subject to a right of 40s. freeholders to course deer towards the forest. The forest officers could enter such lands to drive such beasts back into the forest, if not to kill them in the purlieu.

A chase is a forest in the hands of a subject, who has the forestal rights of the Crown except that of holding Courts or appointing officers. It can exist only by royal grant or prescription founded on lost grant. Such grant or prescription may extend over lands not owned by the grantee (*Robinson* v. *Dhuleep Singh*, 1879, 11 Ch. D. 798).

A park, from the point of view of the old game laws, is a chase enclosed. Besides the royal grant or prescription, the claimant of park privileges must prove actual enclosure, and the existence of beasts of forest and chase within it. The right to enclose extends to lands within the limits of the park, but not owned by the grantee. The owner of a legal park, it is said, may shoot dogs chasing game in it (*Wright* v. *Ramscot*, 1668, 1 Wms. Saun. 84 *n.* 3). In common parlance a park is enclosed land in which deer are kept. The sporting rights in such a park arise *ratione soli*, and not *ratione privilegii*.

Free warren, which also can exist only by royal grant or prescription, is a franchise which gives the grantee a property in the beasts and fowl of warren, but no other animals (*Devonshire* (*Duke*) v. *Lodge*, 1827, 7 Barn. & Cress. 36, at p. 39), on the lands over which the franchise exists, whether they belong to the grantee or not. The right is an incorporeal hereditament passing only by deed of grant (*Beauchamp* (*Earl*) v. *Winn*, 1873, L. R. 6 H. L. 223), and gives the grantee an action of trespass against unauthorised persons hunting within the limits of the franchise, and a right to kill dogs accustomed to hunt therein.

Manors are franchises derived from the Crown by grant prior to 1290 or by prescription. They entitle the lord usually only to game on the demesne lands, or the open and unenclosed lands, *i.e.* the wastes (1831, c. 32, s. 10). Where manors have been enclosed under Inclosure Acts, the limits of the lord's rights depend on the wording of the Acts; and if no reservations are then made in his favour, the right to game is usually held to pass to the allottees in freehold of enclosed lands under the Act (*Devonshire* (*Duke*) v. *O'Connor*, 1890, 24 Q. B. D. 468; *Sowerby* v. *Smith*, 1873, L. R. 8 C. P. 514; *Ewart* v. *Graham*, 1859, 7 H. L. 331).

In all these places the sporting rights might extend over land not owned or occupied by their possessor, *i.e.* they overrode the common law rights of the freeholder, or made his tenement servient or subject to this special kind of *profit à prendre* (*Ewart* v. *Graham*, *ubi supra*). But they had a characteristic in common with rights *ratione soli*, that when animals to which the privilege applied were killed within the franchise, the property

vested in the grantee or owner (*Lonsdale (Earl)* v. *Rigg*, 1857, 25 L. J. Ex. 196; *Blades* v. *Higgs*, 1865, 11 H. L. 621).

Rights ratione soli.—When not overridden by the privileges, the right existed in every occupier of land by virtue of his possession to kill all wild animals found thereon, and to all animals there killed, and to exclude all persons from trespassing thereon in pursuit of game (*Moore* v. *Plymouth (Earl)*, 1819, 7 Taun. 614; 18 R. R. 604). Under the Game Act, 1831 (1 & 2 Will. IV. c. 32, s. 7), the landlord was given a paramount right to take game on lands then leased for less than twenty-one years, but otherwise, neither the Act of 1831, nor the Ground Game Act, 1880 (c. 47), affected the common law presumption in favour of the occupier (*Pochin* v. *Smith*, 1888, 52 J. P. 4). The right is said to extend to give him a qualified property *per impotentiam* in the immature young of animals breeding on the land (case of *Swans*, 1592, 7 Co. Rep. 16 *a*), and when he has *per industriam* captured or killed game, he acquires a property in it sufficient to enable him to maintain trespass or trover or to prosecute for larceny (*R.* v. *Robinson*, 1859, 28 L. J. M. C. 58).

The owner, in case of a lease, usually reserves the sporting rights to himself, his grantees or licensees, which, if done by apt words, may include a right to kill more than game (*Jeffreys* v. *Evans*, 1865, 19 C. B. N. S. 264). This power is recognised and saved in sec. 8 of the Game Act, 1831, and sec. 6 of the Hares Act, 1848. But he cannot deprive the occupier of the concurrent right to kill hares and rabbits (1880, c. 47).

In tenancies created since 7th September 1880, a reservation of rights as to ground game, hares and rabbits, is inoperative as against the occupier, and persons authorised by him, *i.e.* (1) members of his household resident on the land; (2) persons in his ordinary, *i.e.* regular, service on the land; (3) some one person *bonâ fide* employed for reward to take and destroy ground game, under a written authority, which must be produced on demand to persons having the concurrent right to take ground game, or authorised in writing by them to make such demand.

The occupier appears to be entitled to let his right, but only so as to give his lessee a right concurrent with his own (*Morgan* v. *Jackson*, [1895] 1 Q. B. 885).

Where, on 7th September 1880, the right to take ground game was legally or equitably vested in some one other than the occupier, by lease, contract of tenancy, or other contract for valuable consideration, the right of the occupier under the Act is suspended until the lease, etc., is determined (1880, c. 47, s. 5; *Allhusen* v. *Brooking*, 1884, 26 Ch. D. 559).

The concurrent right to kill ground game given to the occupier of land by the Act of 1880 does not in any way prejudice the rights, under the game laws, of persons who, though not occupiers of land, have, subject to the Act, exclusive right of killing game thereon (1831, c. 32, ss. 7–12; 1880, c. 47, s. 7).

The owner of sporting rights over the lands of others may demise them, but only by grant under seal, which should contain a right of entry (*Bird* v. *Higginson*, 1837, 2 Ad. & E. 696; 6 Ad. & E. 824; *Houston* v. *Sligo (Marquis)*, 1887, 55 L. T. 614). But a parol reservation on a parol demise of land is enough to prevent licensees of the landlord from being trespassers under the Game Act, 1831 (*Jones* v. *Williams*, 1877, 40 L. J. M. C. 270; *Liversedge* v. *Whiteoak*, 1893, 57 J. P. 692).

Crown forests, parks, and chases, and any hundred, honour, manor, or lordship, which is part of the possessions or land revenues of the Crown, are exempted from the Game Act, 1831 (s. 9), but not so as to enlarge the rights of lords of manors within a forest or chase. Such Crown property is

managed by the Commissioners of Woods and Forests, under 10 Geo. IV. c. 50, under which (s. 14) stewards of manors may be appointed to preserve game, deer, hart, hind, and fish, who can kill game without excise licence, but not without gun licence. A trespasser in forests can be arrested and dealt with under secs. 31, 33, 36 of the Act of 1831, or by the special Acts regulating the forest.

Stewards of the Crown and lords of manors are authorised to appoint gamekeepers to preserve or kill game within the privileged area (1831, c. 32, s. 13), and to seize, for the use of the steward or lord, all dogs, nets, and contrivances for the killing or taking of game, as are used within the area by persons not having a game certificate or licence (1831, c. 32, ss. 13, 14). A similar power is given to persons having rights to kill game in water on lands worth £500 a year (s. 15). The appointments are registered with the clerk of the peace (s. 16).

The gamekeepers so appointed are exempted from the penalties for trespass in pursuit of game within the manors, etc. (1831, c. 32, s. 35), and they and other gamekeepers and servants of persons having sporting rights *ratione soli*, or by demise therefrom, have certain rights of arrest of poachers and trespassers in search of game. The police can arrest only under the Act of 1862 (*infra*), or where an indictable offence is being committed in the night (14 & 15 Vict. c. 19, s. 11; *R.* v. *Sanderson*, 1859, 1 F. & F. 598).

Civil and Criminal Remedies.—*Civil Remedies.*—The occupier of land is entitled to sue for trespass and injunction any person entering his land, except by superior right, to kill game, or shooting into the land (*Merest* v. *Harvey*, 1814, 5 Taun. 448; 15 R. R. 548; *Pickering* v. *Rudd*, 1815, 4 Camp. 220; 16 R. R. 777). He can also eject the trespasser with necessary violence. The owner of free warren can sue even a tenant for breach of his franchise, and the owner of a manor can sue persons who go on the waste to kill game, even commoners or owners of cattle gates (*Carnarvon* (*Earl*) v. *Villebois*, 1844, 13 Mee. & W. 313).

The right of action is barred if criminal proceedings have been taken by, or with the concurrence of, the same person for the same trespass, and have been heard on the merits (1831, c. 32, s. 46; 1848, c. 43, s. 14).

Offences with respect to Deer, Game, etc.—The numerous criminal offences, all statutory, with respect to killing animals as to which the offender has no sporting rights, are usually summed up under the name of poaching. They are divisible into (*a*) deer stealing; (*b*) taking game at night; and (*c*) taking game by day.

Deer Stealing.—In England deer includes red-deer, fallow-deer, and roedeer. They are beasts of forest and chase, but are not within the definition of "game," except for the purpose of excise licences to kill them. The licence is not needed by an owner or occupier of enclosed land, or for hunting deer with hounds (23 & 24 Vict. c. 90, ss. 2–5 (4) (5)). Deer on enclosed land are the property of the owner or occupier, and are the subject of larceny at common law. But special provision is made in the Larceny Act, 1861, c. 96, for hunting, snaring, killing, wounding, or attempting to kill and wound, deer in enclosed land, which is felony (s. 14); or unenclosed parts of a forest, chase, or purlieu, which is summarily punishable for the first offence, and felony for the second (s. 13); or for setting engines to take deer in forest, chase, or purlieu, enclosed or unenclosed, or in the deer fences or banks of such lands, or in deer parks; or for putting down deer fences; which is summarily punishable (s. 16). Penalties are imposed (by s. 17) on persons who are found in possession of venison or parts of

deer, or snares or engines, and cannot satisfactorily account for it; and deerkeepers may seize the firearms or snares of persons found on the lands already specified with the object of killing deer; and resistance to such keepers is a misdemeanour (s. 17). There are *fence months* in which deer may not be killed, and in which forests are closed to commoners; but no statutory close time for deer. Trespass in hunting deer is not within the Game Act, 1831 (s. 35); but appears to be actionable as to lands not within forest, chase, or purlieu (see FOXHUNTING).

Taking Game at Night.—1. It is not lawful for any person to use firearms to kill hares, rabbits, or other game by night, *i.e.* (1831, c. 32, s. 12; 1848, c. 29, s. 5; 1880, c. 47, s. 6) a penalty is imposed under the later, but not the earlier, Act. Night means between one hour after sunset and one hour before sunrise (see *Curtis* v. *Marsh*, 1858, 28 L. J. Ex. 36).

2. The entry or presence at night on land, open or enclosed, of three or more persons together, armed with firearms or other offensive weapons, with intent to take or destroy game or rabbits, is an indictable misdemeanour, punishable by penal servitude from three to fourteen years, or imprisonment with hard labour for not over three years (9 Geo. IV. c. 69, s. 9; 54 & 55 Vict. c. 69, s. 1).

3. It is an offence (*a*) unlawfully to take or destroy game or rabbits by night on open or enclosed land, or at the outlets of such land to a public way, or on or at the side of such way; (*b*) unlawfully to enter and be on such land or way with guns or instruments for taking game.

A Court of summary jurisdiction may sentence an offender, on a first conviction, to three months' imprisonment with hard labour; on a second conviction, to six months' imprisonment with hard labour, and to find sureties not to offend again for two years, and, in default of sureties, to twelve months' further imprisonment. The offence, if committed for the third time, becomes an indictable misdemeanour punishable by penal servitude from three to seven years, or imprisonment with or without hard labour for not over two years (9 Geo. IV. c. 69, s. 1; 7 & 8 Vict. c. 29; 54 & 55 Vict. c. 69, s. 1).

Persons found committing the offence may be arrested by the owner or occupier of the land, or any person who has the right or reputed right of purchase or free warren thereon, or the lord of the manor or reputed manor within which it lies, or by their gamekeepers, or servants, or any persons assisting them. The arrest may be made on the land, or, on fresh pursuit, in any place to which the offender has escaped (Oke, 4th ed., 137).

4. If the poacher assaults or offers violence with an offensive weapon to a person entitled to arrest him, he is guilty of an indictable misdemeanour, punishable as No. 2. (9 Geo. IV. c. 69, s. 2). Prosecutions on indictment must be instituted within twelve months of the offence, and the offence is triable at Quarter Sessions. An appeal lies to Quarter Sessions from summary convictions under 2. It has been held that the accused, when charged after a first conviction, cannot elect to be tried by a jury under 42 & 43 Vict. c. 49, s. 17 (*Williams* v. *Wynn*, 1888, 57 L. J. M. C. 30). The previous convictions must not be put in evidence till after adjudication on the subsequent offence (*R.* v. *Woodford*, 1887, 16 Cox C. C. 314). A register is kept, and made evidence (1831, c. 32, s. 8); but this must be stated in the indictment (*Cureton* v. *R.*, 1861, 30 L. J. M. C. 149).

5. The capture or killing, or setting traps for, hares or rabbits in warrens (not free warrens) or grounds lawfully used for breeding or keeping them is an indictable misdemeanour if done at night, and is punishable, on summary conviction, by a fine of £5 if done in the daytime (24 & 25 Vict.

c. 96, s. 17). There is an exception as to killing rabbits by day on certain sea banks and river banks in Lincolnshire. Receiving hares or rabbits so taken is punishable under sec. 95 of the same Act. The offences are triable at Quarter Sessions.

The Act of 1861 does not repeal or alter the Act of 1828 (*Bevan* v. *Hopkinson*, 1876, 40 J. P. 117). The taking punishable under these enactments means catching, and not taking in the sense required to constitute larceny (*R.* v. *Glover*, 1814, Russ. & R. 269).

It is an offence to obtain game unlawfully by trespass, or to use guns, nets, etc., for unlawfully killing or taking game, if the accused have been actually found in a highway, street, or public place with game or an implement either heard, seen, or felt on them, and actually seized (not necessarily on the highway) by a constable who had good cause to believe they were coming from land where they had been poaching (*Clarke* v. *Crowder*, 1869, L. R. 4 C. P. 638; *Turner* v. *Morgan*, 1875, L. R. 10 C. P. 737; *Lloyd* v. *Lloyd*, 1885, 14 Q. B. D. 725). The incidents of the offence are exhaustively treated in Oke, *Game Laws*, 4th ed., 150–158.

Taking Game by Day.—Actual personal trespass in the daytime in pursuit of game, snipe, woodcock, quail, landrail, or rabbits is punishable, on summary conviction, by penalty not exceeding 40s. The trespasser must on demand give his name and address, and quit the land. If the address is false, or he refuses to quit or returns, he may be arrested, and on conviction incurs an increased penalty up to £5 (1831, c. 32, s. 30; *R.* v. *Pratt*, 1853, 4 El. & Bl. 860; *Osbond* v. *Meadows*, 1862, 31 L. J. M. C. 238; *Tanton* v. *Jervis*, 1879, 43 J. P. 874). There is a like provision as to trespass in forests in pursuit of game (1831, c. 32, s. 33). This enactment is not affected by sec. 52 of the Malicious Damage Act, 1861; but wilful and malicious damage, injury, or spoil in course of trespass is punishable under that and other sections of the latter Act (24 & 25 Vict. c. 97, s. 52).

It is an answer to the prosecution to set up (*a*) a *bonâ fide* claim of right or anything which would be a defence to a civil action for trespass, (*b*) absence of *mens rea* or guilty mind, *e.g.* belief that he had leave and licence (*Watkins* v. *Major*, 1875, L. R. 10 C. P. 162; *R.* v. *Crichton*, 1878, 26 W. R. 681; *Roberts* v. *Hartopp*, 1895, 64 L. J. M. C. 200).

Where the trespass is by five or more persons acting jointly, each is liable to be fined £5; and to an additional penalty of £5 if any carry firearms and use violence or threats to prevent the approach of a person entitled to warn them off or demand their address (1831, c. 32, s. 30).

Occupiers who pursue or kill game on their land which is reserved exclusively to the lessor, landlord, or other persons, or allow any other person to do so, though not guilty of game trespass, are liable on summary conviction to a penalty not exceeding 40s. for the pursuit, and not exceeding 20s. for each head killed or taken (1831, c. 32, s. 12), with imprisonment in default (1879, c. 49, s. 5). This enactment only extends to game in the narrowest sense (*Spicer* v. *Barnard*, 1859, 28 L. J. M. C. 176; *Padwick* v. *King*, 1860, 29 L. J. M. C. 42). The title of the prosecutor to the sporting rights must be strictly proved (*Barker* v. *Davis*, 1865, 34 L. J. M. C. 140). In the case of free warren the only effectual remedy is by action for breach of franchise (*Carnarron* (*Earl*) v. *Villebois*, 1844, 13 Mee. & W. 313).

Eggs.—Persons who have not sporting rights who take or destroy in the nest or possess the eggs of game birds or of swans, wild ducks, teal, or widgeon, are liable on summary conviction to a penalty of 5s. an egg (1831, c. 32, s. 24), and the eggs of game birds and of woodcock and

snipe are included in the definition of game in the Poaching Prevention Act, 1862 (c. 114, s. 1).

Poison.—It is an offence—(1) to place poison on land with intent to injure or destroy game (1831, c. 32, s. 3);

(2) To place poison for hares or other game (1848, c. 29, s. 5);

(3) For an occupier to use poison to kill ground game (1880, c. 47, s. 6);

(4) To place poisoned grain or seeds on land (1851, c. 13; 1863, c. 113).

Traps.—It is also an offence—(1) to set man-traps or spring guns (1861, c. 100, s. 31), but not dog spears (*R.* v. *Hill*, 1885, 48 J. P. 743);

(2) To use spring traps to kill ground game except in rabbit holes (1880, c. 47, s. 6; *Brown* v. *Thompson*, 1882, 9 Rettie, 1183; *Fraser* v. *Lawson*, 1882, 10 Rettie, 396).

The restrictions with reference to poison for ground game and spring traps do not apply to owners in occupation, but apply to occupiers even when they have the sporting rights (*Smith* v. *Hunt*, 1885, 16 Cox C. C. 54; *Saunders* v. *Pitfield*, 1888, 58 L. T. 188). Offences punishable summarily under the Acts of 1831 and 1862 must be prosecuted within *three* months of commission, instead of *six* months as in the case of most offences summarily punishable, and there is an appeal to Quarter Sessions (1831, c. 32, s. 41; 1862, c. 114, s. 3).

Licences.—1. *For killing Game.*

A. As a general rule, it is unlawful for any person to kill or take game who has not an excise licence or certificate authorising him to do so (1860, c. 90, ss. 2–4). The mode of capture is immaterial (s. 4), *i.e.* a licence for hawking is necessary; but if it is by shooting, a gun licence is also required (see Firearms). The licence is issued by the Inland Revenue Department. The penalties for acting without it are—(1) that imposed by sec. 4 of the Act of 1860, £20 (as to which see 45 & 46 Vict. c. 72, s. 6); (2) cumulatively, that imposed by sec. 23 of the Game Act, 1831, £5. "Game" includes not only hares, pheasants, etc., but also deer, woodcock, snipe, quail, landrail, and rabbits (s. 2). The charges for the licence are: £3 for a licence taken out after July 31 and before November 1, and lasting till the next July 31; £2 for a licence from July 31 to October 31; and £2 for a licence from November 1 to July 31; and £1 for a licence for fourteen days (46 & 47 Vict. c. 10, ss. 4, 5).

Licences are not needed (1) for taking woodcock or snipe in springes or nets; (2) for taking rabbits by the owner of a warren or of enclosed land, and the taking of rabbits or hares by the tenant of lands or persons acting under his direction or permission (1860, c. 90, s. 5 (2); 1880, c. 47, s. 4): (3) for coursing hares with greyhounds or hunting them with beagles or harriers (cp. 1842, c. 29, s. 6); (4) for hunting deer with hounds or killing them in enclosed lands, by or with the direction or permission of owner or occupier.

No licence need be taken out (*a*) by any of the Royal Family, or the gamekeepers of the Queen, or of the Commissioners of Woods and Forests, if appointed under statute; (*b*) by persons authorised to kill hares without game certificate under the Hares Act, 1842 (c. 29, ss. 2, 3); (*c*) by occupiers and persons authorised by them under the Ground Game Act, 1880; (*d*) by persons assisting to take game in the presence of persons who are licensed in their own right and are using their own dogs, guns, etc., *i.e.* assistants, beaters, and guests without guns (see Oke, 4th ed., 55, 56). A licence taken out in Scotland or Ireland is valid in England.

B. Gamekeepers' licences are granted under the Act of 1860 at a cost of £2 per annum. They are valid only on lands over which the keeper's

employer has a right to shoot (1831, c. 32, ss. 6, 13; 1860, c. 90, ss. 2, 6, 9; Oke, 4th ed., 58). They are not necessary in the cases provided for by the Hares Act, 1842 (c. 29, ss. 2, 3). They do not authorise the keeper to sell game, for which he must have the £3 licence under the Act of 1860, c. 90. His master must also take out a licence for the keeper or a man-servant.

These licences are issued for revenue purposes only, and the Acts creating them are not strictly game laws (*Stevens* v. *Copp*, 1869, L. R. 4 Ex. 20). They give no authority to trespass in pursuit of game, or to kill game, except where the licensee is entitled to kill independently of the licence. In fact, game licences and gun licences are forfeited on conviction of game trespass (1860, c. 90, s. 11).

2. *For dealing in Game.*—It is unlawful for any person to deal in game unless he has two licences—(*a*) A local licence, which is obtained in a county district from the district council, rural or urban, and in a county borough from the town council. Special meetings of the council are held, of which each member must have special notice. The licensee must be a householder or a shopkeeper or stallkeeper within the district. Innkeepers, licensed victuallers, or holders of beer dealers' retail licences, and owners, drivers, or guards of any public conveyance, and carriers or higglers or their employees are disqualified (*Shoolbred* v. *St. Pancras Justices*, 1890, 24 Q. B. D. 346). But this does not prevent innkeepers from selling game for consumption on the premises (1831, c. 32, s. 26). The licence is issued in the form A. scheduled to the Game Act, 1831, under the seal of the council, and must specify the premises at which the game is to be sold. It expires on July 1. It now applies to hares, pheasants, partridges, heath and moor game, grouse, blackgame, and bustards, alive or dead, whether killed in the United Kingdom or in a foreign country (*Loome* v. *Baker*, 1860, 30 L. J. M. C. 31; *Pudney* v. *Eccles*, [1893] 1 Q. B. 52; 1 & 2 Will. IV. c. 32, ss. 18, 21, 29; 2 & 3 Vict. c. 35; 23 & 24 Vict. c. 90, s. 13; 32 & 33 Vict. c. 14; 56 & 57 Vict. c. 7, s. 2; 56 & 57 Vict. c. 73, s. 24). (*b*) An excise licence to deal in game, which costs £2, is granted only on production of a local licence issued to the applicant, and runs for a year from the date of its issue (1860, c. 90, ss. 2, 14, 15, 16).

It is an offence for a person having a local licence to deal in game—

(1) To buy game except from a licensed dealer or a person who holds a £3 licence under the Act of 1860, or a person directed by a justice in writing to sell game unlawfully taken, and seized under the Act of 1862, or hares killed under the authority of the Ground Game Act, 1880 (c. 47, s. 4). Penalty, £10 (1831, c. 32, s. 28; 1860, c. 90, ss. 2, 14; 1862, c. 114, s. 2). The game certificates under the Acts of 1831, ss. 5, 6, and 1848, ss. 1, 2, are superseded by the £3 licence under the Act of 1860 (s. 6). Ignorance that the seller was not qualified to sell is no defence (*R.* v. *Muirhead*, 1887, 51 J. P. 60).

(2) To sell except at the licensed premises or without a board fixed up, "LICENSED TO DEAL IN GAME." Penalty, £10 (1831, c. 32, s. 28).

(3) To sell or possess, within ten days of the beginning of close time, game other than foreign game. Penalty, £1 a head (1831, c. 32, s. 4; *R.* v. *Guyer*, 1889, 23 Q. B. D. 100; 1892, c. 8, s. 3). Similar provisions are made by the Wild Birds Protection Acts as to the sale of other birds in close time (see BIRDS and the Wild Birds Protection Act, 1896). Conviction of any of these offences forfeits the local licence (1831, c. 32, s. 22).

(4) To sell without an excise licence. Penalty, £20 (1860, c. 90, s. 14).

Persons who pretend to have a local licence are liable to a penalty of £10 (1831, c. 32, s. 28). Persons who ought to have a local licence, and

sell without it or an excise licence, incur a penalty of £20 (1861, c. 94, s. 17). Persons not licensed to deal in game who buy game except from a licensed dealer, or in good faith from a place where a dealer's licence board is affixed, incur a penalty of £1 per head bought (1831, c. 32, s. 27). All these penalties are recoverable before a Court of summary jurisdiction. Proceedings relating to excise licences can be taken only by the Inland Revenue officers.

Conviction of offences 1., 2., and 3. entails forfeiture of the local licence. It is not settled how far a licensed person is liable to conviction for offences by his partners or servants (Oke, *Game Laws*, 4th ed., p. 70).

[*Authorities.*—Manwood, *Forest Laws*; Oke, *Game Laws*, 4th ed. by Bund; Warry, *Game Laws*; Archbold, *Cr. Pl.*, 21st ed., 1865; Atkinson, *Magistrate's Annual Practice*, 1897, 355.]

Games.—No sport, pastime, game, or exercise was unlawful at common law unless so carried on as necessarily to involve or actually to occasion a public nuisance, or a real and not a technical breach of the public peace, or it is said a danger to public morals (*Sharbon* v. *Colebach*, 1692, 2 Vent. 175; *R.* v. *Rogier*, 1823, 2 D. & R. 541). Fighting, whether in a hostile spirit or for a prize, is not to be considered a game within this rule (see Boxing Match). To make a game unlawful it is therefore necessary to refer to the terms of some statute, and the question of lawfulness or unlawfulness is one of law for a Court, and not of fact for a jury, to decide (*R.* v. *Davies*, [1897] 2 Q. B. 199).

An Act of 1388 (12 Rich. II. c. 6) forbade labourers, servants in husbandry or servants of artificers or victuallers to carry any weapon, but bows and arrows, or to play *quoits*, *tennis*, *football*, dice, *casting the stone* (*qu.* bowling), *cails* (skittles), and other such "importune" games. The Act was confirmed in 1409 (11 Hen. IV. c. 4), and in 1477 (17 Edw. IV. c. 3) was extended to certain "newly imagined" games, such as *closh* and *kailes* (forms of ninepins or skittles), *half bowl*, *hand in and out*, and *queckboard*. In 1503 (19 Hen. VII. c. 12, s. 7) provision was made to punish servants playing certain games except at Christmas. These Acts were ordered to be put into execution in 1511 (3 Hen. VIII. c. 3) and 1514 (6 Hen. VIII. c. 2), but they were repealed in 1624 (28 Jac. I. c. 28, s. 11), and the right to play football, even in a public street, has been claimed even in 1897. It is clearly illegal in such a place (5 & 6 Will. IV. c. 50, s. 72). The Acts had in 1541 been in substance repealed and consolidated by 33 Hen. VIII. c. 9, which was passed to drive the lieges to practise archery and to encourage the trade of bowyers, fletchers, stringers, and arrowsmiths (s. 1). The numbering of the sections of this Act in the Statutes at Large (Ruffhead) differs from that in the 2nd edition of the Statutes Revised. In this article the text of the latter has been used.

That Act punished three classes of offence—

(1) The keeping or maintaining common houses, alleys, or places for *bowls*, *quoits*, *cloysh*, *caile* (ninepins), *half bowls* (see Strutt, 241), *tennis*, dicing table, or carding, or games prohibited by any prior statute (*vide ante*) or unlawful games then invented, or any unlawful new game to be invented. The penalty was 40s. per diem (s. 8).

(2) Haunting such common gaming-houses; penalty 6s. 8d. (s. 8), and recognisances (s. 8; 2 Geo. II. c. 28, s. 9; *Murphy* v. *Arrow*, [1897] 2 Q. B. 527).

(3) The playing by artificers, husbandmen, their apprentices, journeymen,

or servants, or seamen, fishermen, or watermen, or serving men of tables (backgammon), dice, cards, bowls, closh, quoits, logating (see Strutt, p. 239), or any other unlawful game except at Christmas, and this only in the house or presence of their masters; penalty 20s. and committal to prison till they gave security not to offend again (s. 11; 2 Geo. II. c. 28, s. 9).

The penalties are now recovered by information, under the Summary Jurisdiction Acts, which must be laid within one year of the offence, and are applicable as prescribed by sec. 12 of the Act of 1541. Sec. 13 directs proclamation of the Act quarterly, and sec. 9 empowered justices to enter gaming-houses and arrest keepers and players and take from them securities for the peace and good behaviour. See GAMING-HOUSE. The Act is not directed against deceitful or excessive gaming for money or valuable things, but against *playing* any forbidden game. Sec. 8 suggests that common gaming within the Act could be legalised by placard or licence granted on recognisance filed in Chancery. But the licensing of houses for unlawful gaming was stopped in 1554 (2 & 3 Phil. & Mary, c. 9).

The Act did not apply to royal palaces, or within the verge of the Court, whence no doubt the fact that till recent years tennis courts existed only in palaces. An Act of 1664 (16 Chas. II. c. 7), now repealed, dealt with the same games, but added shovelboard and skittles, and was aimed at excessive and deceitful gaming, and passed to enforce the view that "lawful games and exercises should not be otherwise used than as innocent and moderate recreations, and not as constant trades or callings to gain a living, or make an unlawful advantage thereby" (see *Jenks* v. *Turpin*, 1884, 13 Q. B. D. 505, at 516, 518). The Act applied to horse-racing.

In 1698 (10 Will. III. c. 23) lotteries were described as unlawful games and rendered punishable as public nuisance. As to this and subsequent enactments on the subject, see LOTTERIES.

The Gaming Act, 1710 (9 Anne, c. 19), dealt with the same subject-matter. It was repealed in 1835 (5 & 6 Will. IV. c. 41) and 1845 (8 & 9 Vict. c. 109, s. 15), except sec. 1, which relates to GAMING (*q.v.*). It dealt with the same games as the Act of 1664 (*Applegarth* v. *Colley*, 1842, 10 Mee. & W. 723), and seems to have included cricket (*Jeffreys* v. *Walter*, 1748, 1 Wils. 220).

The Gaming Act, 1738 (12 Geo. II. c. 28), declared (s. 2) the games of ace of hearts, pharaoh or FARO, basset, and hazard to be unlawful games within the Lottery Acts; and the Gaming Act, 1739 (13 Geo. II. c. 19, s. 9), added to the list of such unlawful games, passage and all and every other game invented or to be invented with dice or any other instrument, engine, or device in the nature of dice having figures or numbers thereon (except backgammon and other games then played with backgammon tables). The Gaming Act, 1744 (18 Geo. II. c. 34), declared roulette or roly-poly an unlawful game.

Under these enactments all games with cards or dice, except backgammon, are unlawful, unless they are games of mere skill within sec. 1 of the Gaming Act, 1845; and they have been held to apply to *baccarat*, *banque* (*Jenks* v. *Turpin*, 1884, 13 Q. B. D. 505), and *chemin de fer baccarat* (*Fairlough* v. *Whitmore*, 1895, W. N. 52); and the same applies to all games of chance and skill combined (*Jenks* v. *Turpin*, *l.c.* p. 524).

But the unlawfulness is not absolute, and arises only where games of mere chance, or of chance and skill combined, are played at a house kept for playing at them (*l.c.* 524); and it would even seem that playing a lawful game, *i.e.* one of mere skill at such a place, is also unlawful (*l.c.* 521, 522). The last result is somewhat strange, and should perhaps be limited to the case suggested in *R.* v. *Rogier*, 1822, 1 Barn. & Cress. 252; 25 R. R.

393, of playing a lawful game for an excessive stake (*Jenks* v. *Turpin*, at p. 532).

As to bets and contracts made on games, whether lawful or unlawful, see GAMING (AND WAGERING). As to penalties for playing such games, see GAMING-HOUSE. As to playing games of chance in the streets, see BETTING, 2., *ante*, vol. ii. p. 65.

Games of Skill.—With regard to games of mere skill, the Act of Henry VIII. never seems to have been efficiently enforced. Running, leaping, wrestling, pitching the sledge, throwing the hammer, and pitching the bar (tossing the caber) were regarded as legal (*temp.* Eliz.), though bear-baiting and bull-baiting on the Sabbath were objected to as Sunday recreation (Govett, *Book of Sports*, 23–25, 68–74), and were encouraged by James I. in the *Book of Sports*. But the Lord's Day Act, 1625 (1 Car. I. c. 1), still unrepealed, prohibits all meetings on Sunday by people out of their own parishes for any sport or pastime whatever, and all meetings within their parishes on that day for bull-baiting, bear-baiting, interludes, common plays, or other unlawful exercises or pastimes. And in 1845 (8 & 9 Vict. c. 109, s. 1) the Act of 1541 was repealed as to the games above italicised, and all games of mere skill, including BILLIARDS (*q.v.*) and dominoes (*R.* v. *Ashton*, 1852, 1 El. & El. 286). As to other unlawful games, it continues in full force, and even lawful games of skill may not be played in a common gaming-house.

Sports involving cruelty to animals are rendered illegal by 12 & 13 Vict. c. 92. Similar provisions had been made as to the metropolitan police district by 2 & 3 Vict. c. 47, s. 47, and as to towns by 10 & 11 Vict. c. 89, s. 36. Keeping a cock-pit is said to have been unlawful at common law, but not mere cock-fighting (Strutt, *Pastimes*, p. 248; *R.* v. *Howel*, 1675, 3 Keb. 465 and 510; *Squiers* v. *Whisken*, 1811, 3 Camp. 140; *Clarke* v. *Hague*, 1859, 2 El. & El. 281: *Morley* v. *Greenhalgh*, 1863, 32 L. J. M. C. 93; and the Scotch case, *Johnston* v. *Abercrombie*, 1892, 20 Rettie (Justiciary), 37, 42, which led to the passing of the Act 58 & 59 Vict. c. 13). But Henry VIII. himself set up a cock-pit in Whitehall, perhaps relying on the exemption of the Crown from the Act of 1541.

[*Authorities.*—Hawk., P. C., bk. i. c. 75; Coldridge and Hawksford, *Law of Gambling*, 1895; Stutfield on *Betting*, 3rd ed.; Govett on *Book of Sports*, 1890; Strutt, *Pastimes*, 2nd ed., 1810.]

Gaming (and Wagering).—Under this head distinct considerations arise (1) with respect to contracts or bargains made by way of gaming and wagering; (2) with respect to cheating when such contracts have been made.

I. Gaming is playing at any game, sport, pastime, or exercise, lawful or unlawful, for money or any other valuable thing, which is staked on the result of the game, etc., *i.e.* which is to be lost or won, according to the success or failure of the person who has staked (*R.* v. *Ashton*, 1852, 1 El. & Bl. 286).

Wagering, which includes betting, is making a contract on an unascertained event, past or future (in which the parties have no commercial interest other than that created by the contract), by which the parties are to gain or lose, according as the uncertainty is determined one way or the other. The consideration is the mutual promises to pay according to the event (*Carlill* v. *Carbolic Smoke Ball Co.*, [1892] 2 Q. B. 484). It does not include contracts of insurance or indemnity against risks to the property

of one party (see 19 Geo. III. c. 37, and the Gambling Act, 1774, 14 Geo. III. c. 78); nor sales of "futures," *i.e.* goods which the vendor has not, or undeclared dividends, or next year's crop of fruit (*Hibblewhite* v. *M'Morine*, 1839, 5 Mee. & W. 462; 56 & 57 Vict. c. 71, s. 5; *Martin* v. *Gibbon*, 1875, 24 W. R. 87); nor even speculative sales of stocks and shares, unless the contracts for sale and purchase are purely fictitious, and what are called "time bargains" or "difference transactions" (*Forget* v. *Ostigny*, [1895] App. Cas. 318; *Universal Stock Exchange* v. *Strachan*, [1896] App. Cas. 166). In such cases the Courts look behind the bought and sold notes or other evidences of the alleged commercial contract, to ascertain what is the real transaction. They are specially ready to do so in the case of "cover" transactions with outside dealers in stocks.

Contracts of insurance are wagers—(1) in the case of life assurance, where the policy is on the life of another, in which the assured has no insurable interest, *i.e.* no liability to pecuniary loss by the death (14 Geo. III. c. 48), except in the case of certain insurances within the Friendly Societies Acts, 1896 (c. 25, c. 26, s. 13 (2)); (2) in the case of fire and marine insurance, where there is no insurable interest independent of the policy or contract, *i.e.* no property or commercial adventure at stake (14 Geo. III. c. 48; 19 Geo. II. c. 37) (*Kent* v. *Bird*, 1777, 2 Cowp. 583; *Lowry* v. *Bourdieu*, 1780, 2 Doug. 468; Porter on *Insurance*, 2nd ed., p. 7; Bunyon, *Fire Ins.*, 4th ed., p. 6; *Life Ins.*, 3rd ed., p. 12).

It is held by the English but is denied by the American Courts, that wagering contracts were valid and enforceable at common law by count of *indebitatus assumpsit*, if the subject-matter of the contract was not illegal, or immoral, or void, on grounds of public policy (*Smith* v. *Aiery*, 1704, 6 Mod. 128; *Da Costa* v. *Jones*, 1778, 2 Cowp. 729; *Gilbert* v. *Sykes*, 1812, 16 East, 150; 14 R. R. 327). The tendency of judicial opinion in the eighteenth century undoubtedly was to defeat or delay cases brought to recover gaming debts, and to declare them unenforceable on grounds of morality, decency, or public policy; and this opinion was reinforced in certain instances by statutes now repealed and the Lottery Acts. See LOTTERIES.

Gaming and wagering contracts are now regulated from the point of view of civil remedies by the Gaming Acts of 1842 (8 & 9 Vict. c. 109) and 1892 (55 & 56 Vict. c. 4). Sec. 19 of the Act of 1845 put an end to the practice of obtaining decisions on points of law by feigned issues brought on a wager. See FEIGNED ISSUES.

Sec. 18 of the Act renders null and void all contracts, whether written or by parol, by way of gaming or wagering; *i.e.* such contracts are not in any sense criminal or illegal, but are not enforceable in a Court of justice if the provisions of the statute are pleaded (Order 19, r. 15), or the judge during the trial discovers the claim to fall within the statute (*Scott* v. *Brown*, [1892] 2 Q. B. 724). This case deals with illegality only; but its principle seems equally applicable to contracts declared void by statute, and if this is not so the Court can at the option of the parties be made a forum for trying wagers, which is contrary to the cases before 1845, and the obvious intent of the Act of 1845.

The main result of the Act of 1845 has been to make it unnecessary to attempt to reconcile the prior distinctions between illegal and legal wagers, or to explain the *ratio decidendi*, and to enable the Courts to deal with all contracts as absolutely void if they are by way of gaming and wagering, whether they would or would not be illegal from other points of view (*Diggle* v. *Higgs*, 1877, 2 Ex. D. 422, 427; *Trimble* v. *Hill*, 1880, 5 App. Cas. 342, 344). Playing any game whether of chance or skill for money or

money's worth, is gaming within the section (*Dyson* v. *Mason*, 1888, 22 Q. B. D. 351).

From the fact that gaming contracts are void only, and not illegal, flow certain consequences—

1. A man who lost a wager and got another to pay it was liable to him for the money so paid (*Rosewarne* v. *Billings*, 1863, 15 C. B. N. S. 316; *Ex parte Pyke, In re Lister*, 1878, 8 Ch. D. 754).

2. An agent employed to bet, and who did bet, was entitled to pay the bet, and recover from his principal (*Read* v. *Anderson*, 1884, 13 Q. B. D. 779). This decision created the industry of turf commission agents or bookmakers, who, instead of taking bets themselves, betted with others of the confraternity; but in *Cohen* v. *Kittell*, 1889, 22 Q. B. D. 680, the Courts declined to countenance an action by a principal against an agent for not making bets as ordered.

3. Speculative transactions on the Stock Exchange impose an actionable liability on the outside principal, who, by his instructions to his brokers, subjects them by the rules of the Exchange to liability to jobbers (*Ex parte Pyke*). These consequences take such contracts out of the Act of 1845 (*Thacker* v. *Hardy*, 1879, 4 Q. B. D. 685).

4. A man who, as agent of another, has been paid bets made for his principal must pay over his receipts to the principal (*Bridger* v. *Savage*, 1885, 15 Q. B. D. 363; *De Mattos* v. *Benjamin*, 1894, 63 L. J. Q. B. 248); and where a man describes himself as a betting agent, the burden of proof is on him to show he dealt as a principal (*Grimerd* v. *Wiltshire*, 1893, 10 T. L. R. 505).

5. The business of betting is so far lawful that the betting man must pay income tax on his profits (*Partridge* v. *Mallandaine*, 1886, 18 Q. B. D. 276), and that partners in such a business can claim a partnership account (*Thwaites* v. *Coulthwaite*, [1896] 1 Ch. 496), unless the business was criminal within some of the statutes.

6. A security given on account stated between partners in betting transactions has been held good (*Johnson* v. *Lansley*, 1862, 12 C. B. 468), and a cheque given for a stipulated share in winnings under a wagering contract seems to be valid (*Beeston* v. *Beeston*, 1875, 1 Ex. D. 73).

7. A bond given to winners of bets in order to prevent them from posting the loser at Tattersall's has been held valid, on the ground that the consideration was not within 5 & 6 Will. IV. c. 41 (*Bubb* v. *Yelverton*, 1870, L. R. 9 Eq. 471).

The Act of 1892 was passed in consequence of the decisions of *Rosewarne* v. *Billings* and *Read* v. *Anderson*. It renders null and void any promise, express or implied—(1) to pay any person any sum of money paid by him under or in respect of any contract or agreement made null and void by sec. 18 of the Gaming Act, 1845; (2) to pay any sum by way of commission, fee, reward, or otherwise, in respect of any such contract, or of any services in relation thereto or in connection therewith.

The Act is not retrospective (*Knight* v. *Lee*, [1893] 1 Q. B. 41); but its passing had the effect of altering the law as laid down in *Rosewarne* v. *Billings* and *Read* v. *Anderson*. It appears not to have materially affected *Thacker* v. *Hardy* (Stutfield on *Betting*, 3rd ed., 96), and has not at all affected *Bridger* v. *Savage*. It seems that the payer must at his own risk inquire as to the nature of the debt he is paying (*Tatam* v. *Reeve*, [1893] 1 Q. B. 44).

Commercial Wagers.—The Act of 1845, coupled with an Act of 1860 (23 & 24 Vict. c. 28), has legalised "stock-jobbing." It results that speculative sales and purchases of stock are not now necessarily

wagers. The Rules of the London Stock Exchange and the form of the contracts made there, which involve liability to accept or deliver stock sold or bought on the next settling day, have been held, as a general rule, to exclude contracts between jobbers and brokers from the category of wagers (*Thacker* v. *Hardy*, 1879, 4 Q. B. D. 685; *Forget* v. *Ostigny*, [1895] App. Cas. 318). But where a broker on the Exchange deals as a principal with an outside person, he is not entitled to the protection in that case unless it appears that the contracts which are between principals show a real and not a merely colourable right and intention by both parties to give or take delivery of the stocks specified in the bought and sold notes (*Universal Stock Exchange* v. *Strachan*, [1896] App. Cas. 166).

A practice has arisen of demanding security by way of cover from persons who wish to speculate. It is commonest with outside brokers, *i.e.* dealers in stocks and shares who are not brokers or jobbers on the London Stock Exchange, but not unknown within that house. If it is established that the contract between customer and dealer is a wager, at any time before the event of the wager has been ascertained and the dealer has appropriated as winner the money or securities deposited as cover, the customer may repudiate the wager and reclaim his cover or securities (*Universal Stock Exchange* v. *Strachan*, [1896] App. Cas. 166; *Strachan* v. *Universal Stock Exchange*, No. 2, [1895] 2 Q. B. 697). This means that the provisions of the Act of 1845 as to deposit apply not only to a stakeholder but also to a party to the wager, and therefore extend to ready-money betting. "Put and call options" appear not to be treated as wagers (*Sadd* v. *Foster*, 1897, 13 T. L. R. 207). As to wager policies of insurance, see LIFE INSURANCE.

Deposits.—The Act of 1845, s. 18, forbids the recovery by action of any money or valuable deposited in the hands of another to abide the event on which a wager has been made. This veto does not affect subscriptions or contributions or agreements to contribute (unless they are wagers) to a plate, prize, or sum of money to be awarded to the winner of a lawful game or exercise (see GAMES); but covers all other wagers of whatever character, even those not relating to games or sports. So far as subscriptions, etc., are concerned, the Act is construed as above stated in *Diggle* v. *Higgs*, 1877, 2 Ex. D. 422, and *Trimble* v. *Hill*, 1880, 5 App. Cas. 342.

An agreement for a match between two horses, the owner of the winner to have both horses, is not within the proviso, but is a mere wager (*Coombes* v. *Dibble*, 1866, L. R. 1 Ex. 248); nor are deposits made or agreement to pay them to a named person if his horse trotted a given distance in a given time (*Batson* v. *Newman*, 1876, 1 C. P. D. 573).

The provisions of sec. 18 are quite independent of the rules of law as to repudiating contracts void for illegality or recovering deposits paid under them or for an illegal purpose, which are applicable to lotteries and gaming-houses and partnerships for keeping them (*Barclay* v. *Pearson*, [1893] 2 Ch. 154; *Thwaites* v. *Coulthwaite*, [1896] 1 Ch. 496).

Persons who claim to have won a race or game may lawfully sue for the prize; but, as a general rule, the conditions of entry create a peculiar domestic tribunal for deciding the event, with whose decision the Courts will not interfere in the absence of misconduct by the arbiters or unless they have failed to exercise their powers. If the game is lawful the action will lie; but the Courts will not readily interfere with the decision, if any, of the referee or stewards (see *Sadler* v. *Smith*, 1879, L. R. 4 Q. B. 214; 5 Q. B. 40).

A person who makes a wager and deposits a stake can, before the event is determined, repudiate the wager and recover the stake (*Varney* v. *Hickman*, 1848, 5 C. B. 271; *Martin* v. *Hewson*, 1855, 10 Ex. 737), or

can, after it has resulted against him, revoke the stakeholder's authority to pay the winner, and recover his stake (*Hampden* v. *Walsh*, 1876, 1 Q. B. D. 189; *Batson* v. *Newman*, 1876, 1 C. P. D. 573); but he cannot recover the stake from the other party to the wager if it has been paid over to him before repudiation or revocation.

The result of these cases is to make the Act mean that the winner cannot recover by action from the stakeholder anything in the nature of stakes deposited by a competitor, but can recover a prize offered for competition; but that the depositor of the stake can get it back at any time before it is paid over to the winner. The Act of 1892 does not change the law in this respect (*O'Sullivan* v. *Thomas*, [1895] 1 Q. B. 698).

Loans.—Payments by a third person of a wager at the *illegal* request of a party are not recoverable as "money paid" (*M'Kinnell* v. *Robinson*, 3 Mee. & W. 434; *Tatam* v. *Reeve*, [1893] 1 Q. B. 44), nor is a balance due on a betting account (*Butts* v. *Eldred*, 1896, 12 T. L. R. 624).

Money lent to a person who has made a wagering contract, for the purpose of its deposit with a stakeholder to abide the event of the wager, cannot be recovered by the lender even if the borrower has agreed to repay it if he wins the stakes, and has in fact won and received them (*Carney* v. *Plummer*, [1897] 1 Q. B. 634).

Securities.—By the Gaming Act, 1710 (9 Anne, c. 14, s. 9), all *notes*, *bills*, bonds, judgments (*i.e.* voluntary judgments, *Lane* v. *Chapman*, 1841, 11 Ad. & E. 966), *mortgages*, or other securities or conveyances whatsoever, are absolutely void if the whole or any part of the consideration is (1) money or any valuable thing won by gaming, whether the game is lawful or unlawful (*Shilleto* v. *Theed*, 1831, 7 Bing. 405), or betting on the hands or sides of persons so gaming; (2) or for reimbursing or repaying any money knowingly lent or advanced for gaming or betting, or at the time or place of playing or betting. This enactment avoided not only the security even where negotiable, but also the contract to pay or repay (*Applegarth* v. *Colley*, 1842, 10 Mee. & W. 727).

It caused much perplexity from its effect on negotiable securities, and led to many ingenious attempts to evade that result. The result of the decisions was that the drawer of a bill or payee of a cheque and his indorsees could not recover against the acceptor of the bill or drawer of the cheque, and that substituted bills, English or foreign, were no better than the original (*Wynne* v. *Callander*, 1826, 1 Russ. 293; *Hay* v. *Ayling*, 1851, 16 Q. B. 423). But the *bonâ fide* indorsee, payee, or drawer could recover against him (*Edwards* v. *Dick*, 1821, 4 Barn. & Ald. 212; 23 R. R. 255). In the case of bonds and mortgages (apart from the now repealed provisions of the Act), the right of a *bonâ fide* assignee to recover against the losing gambler depended on the law of estoppel, *i.e.* on some declaration by him prior to the assignment on the faith of which it was taken (*Hawker* v. *Hallilwell*, 1856, 25 L. J. Ch. 558).

The supposed hardships of the Act led to its amendment in 1835 (5 & 6 Will. IV. c. 41), so as to make *notes*, *bills*, or *mortgages* not absolutely void, but evidences of a contract made upon an illegal consideration, and to entitle the giver of the security to recover from the holder money paid by him under it, *i.e.* to indorsee of a cheque or assignee of a mortgage (ss. 1, 2) (*Gilpin* v. *Clutterbuck*, 1849, 13 L. T. (O. S.) 71, 159; *Lynn* v. *Bell*, 1876, 10 Ir. R. C. L. 487).

The result is that the holder of such bills or notes, in good faith and without notice of the illegality, can recover on them, but that the burden of proof that he is so lies on him if it is pleaded and shown that the bill arises out of a gaming transaction (45 & 46 Vict. c. 61, ss. 20, 29, 30, 90; *Tatam*

v. *Hasler*, 1889, 23 Q. B. D. 345; *Faulks* v. *Atkins*, 1893, 10 T. L. R. 178). In consequence of this rule it is common to restrain by interim injunction the negotiation of a bill alleged to be tainted with illegality, and if that is proved to direct its delivery up for cancellation.

The effect of the Act on mortgages would seem to make them enforceable by a transferee for valuable consideration (Robbins on *Mortgages*, pp. 619–624). Bonds are not within the words of the statute, because an assignee could not get a better title than the obligor (*Lynn* v. *Bell*, 1876, 10 L. R. Ir. 487), but they are void as voluntary securities under sec. 18 of the Gaming Act, 1845, when given on a wagering consideration only (*Bubb* v. *Yelverton*, 1870, L. R. 9 Eq. 471).

II. Cheating at a game is as old as gaming (1 Pike, *Hist. Cr. Law*, 237, 456). It is said to be indictable at common law (*Holyday* v. *Oxenbridge*, 1631, Cro. (3) 234), and was specially punished under the Acts of 1664 and 1710 (see GAMES). Under sec. 17 of the Gaming Act, 1845, a person who by any fraud or unlawful device or ill practice in playing at or with cards, dice tables, or other game, or in bearing a part in the stakes, wagers, or adventures, or in betting on the sides or hands of the players, or in wagering on the event of any game, sport, pastime, or exercise, wins for himself or others any money or valuable, is liable to indictment and conviction for obtaining property by false pretences (*R.* v. *Hudson*, 1860, 29 L. J. M. C. 145; see FALSE *Pretences*).

[*Authorities.* — Coldridge and Hawksford on *Gaming*; Stutfield on *Betting*, 3rd ed., 1892.]

Gaming-House.—To keep a common gaming-house is a misdemeanour indictable at common law as a public nuisance, and punishable by imprisonment with or without hard labour (*R.* v. *Dixon*, 1716, 10 Mod. 336; 3 Geo. IV. c. 114). Husband and wife can be jointly indicted for the offence (*ibid.*). It consists in keeping open a house to which a large number of persons are invited to congregate habitually for the purpose of gaming, *i.e.* playing at games for money; and falls under the category of public nuisances as being a great temptation to idleness, and apt to draw together great numbers of disorderly persons. The essential element of the offence is not the gain of the keeper, though this is charged in the indictment, but the public scandal and disorder and inconvenience caused by the keeping. In the same way, rope-dancing booths, bowling-alleys, and playhouses have in early cases been treated as nuisances (see *R.* v. *Hall*, 1674, 2 Keb. 846; *R.* v. *Betterton*, 1695, 5 Mod. 142; *R.* v. *Howel*, 1675, 3 Keb. 465). Hawkins (P. C., bk. i. c. 75) does not speak very certainly as to the offence, showing that it was rarely the subject of prosecution at common law. But it is recognised and not directly impaired by legislation. The Act of 1541 (33 Hen. VIII. c. 9) merely imposes a penalty of 40s. a day for keeping house for certain games stigmatised as unlawful. The Disorderly Houses Act, 1751 (25 Geo. II. c. 36), classes gaming-houses with other disorderly houses, and permits prosecution by parish constables on the demand of two inhabitants (s. 5), and facilitates convictions by rendering liable as keepers or owners persons proved to have acted or behaved as masters, or as having the care or management of the house (s. 8). This Act was extended in 1818 (58 Geo. III. c. 70, s. 7) so as to enable parish overseers to prosecute. As to procedure, see BROTHEL.

Under the Gaming Act, 1845 (8 & 9 Vict. c. 109, s. 4), further summary punishment is provided (£100 fine or six months' imprisonment) on the

owners and keepers of a common gaming-house, or persons having its care or management, or bankers, croupiers, or others acting in any manner in conducting the business of the house.

Sec. 2 brings within the definition of common gaming-houses, and of houses within the Act of 1541, every place of which it can be proved (in default of the evidence required under that Act or at common law) (1) that it is kept and used for playing therein at any unlawful game (see GAMES), and (2) that a bank is kept there either by one or more of the players exclusively of the others, or that the chances of any game played therein are not equally favourable to all the players (including the banker, or person by whom the game is managed, or against whom the other players stake, play, or bet). The punishment is a fine not exceeding £100, in addition to the penalties of the Act of 1541. It is immaterial whether the house is open to subscribers only, or to all persons who desire to play (*Crockford* v. *Maidstone* (*Lord*), 1847, 8 L. T. (O. S.) 217). The Acts as to betting-houses make them common gaming-houses (see BETTING-HOUSE); and under the Gaming House Act, 1854 (17 & 18 Vict. c. 38, s. 4), summary punishment may be imposed (£500 and costs or imprisonment up to twelve months), where the owner or occupier or person having the *use* of a place (see *Hawke* v. *Dunn*, [1897] 1 Q. B. 579; *Powell* v. *Kempton Park Racecourse Co.*, [1897] 2 Q. B. 242) opens, keeps, or uses it for unlawful gaming, or permits it so to be opened, kept, or used; or has the care or management of, or in any way assists in the conduct of the house, or advances money for the purpose of gaming with persons frequenting the house. This enactment applies to clubs (*Jenks* v. *Turpin*, 1884, 13 Q. B. D. 505); but not to a case where a private house is used once for playing an unlawful game for money (*R.* v. *Davies*, [1897] 2 Q. B. 199). The summary remedies are alternative to that at common law, and the prosecution, on complying with the Vexatious Indictments Act, 1859, may elect for the common law remedy, while the accused, under sec. 17 of the Summary Jurisdiction Act, 1879, have an option to be tried by a jury for the statutory offences (cp. *R.* v. *Brown*, [1895] 1 Q. B. 119). It is at present uncertain whether it is a condition precedent to the summary jurisdiction of the justices that they should inform the defendant of his right to elect to be tried by a jury. If he so elects, the fact need not be stated in the indictment (*R.* v. *Chambers*, 1896, 65 L. J. M. C. 214).

An appeal lies to Quarter Sessions from a summary conviction (8 & 9 Vict. c. 109, s. 20; 17 & 18 Vict. c. 38, s. 10), subject to the procedure of the Summary Jurisdiction Acts, 1879 and 1884. From *Jenks* v. *Turpin*, 1884, 13 Q. B. D. 505, it would seem that the enactments penalise even playing at lawful games in common gaming-houses (see GAMES).

Persons who merely play at a common gaming-house cannot be convicted as assisting in keeping it or of any of the statutory variations of the offence (*Jenks* v. *Turpin*, 1884, 13 Q. B. D. 505). If, when found there, they give a false name and address on arrest to the constable, or when before a magistrate, they are liable, on summary conviction, to a penalty of £50 (17 & 18 Vict. c. 38, s. 3).

Persons frequenting a gaming-house which is within the Act of 1541 can be fined 6s. 8d., and persons found in any common gaming-house within any of the enumerated Acts may be required to enter into their own recognisances, with or without sureties, no more to play, haunt, or exercise from henceforth at any gaming-house (33 Hen. VIII. c. 9, s. 9; 2 Geo. II. c. 28, s. 9; 2 & 3 Vict. c. 47, s. 48; *Murphy* v. *Arrow*, [1897] 2 Q. B. 527). If the condition of the recognisance is broken it may be forfeited by

summary proceedings under sec. 9 of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), and the "haunter" sent to prison in default of sufficient distress.

The costs of the prosecution are payable as in felony if the defendant elects to be tried on indictment; and in the event of an appeal to Quarter Sessions, the costs of the witnesses are defrayed in the same way (8 & 9 Vict. c. 109, s. 20; 17 & 18 Vict. c. 38, s. 10).

Forms of indictment are given in Archbold, 21st ed., p. 1032, and of informations in Oke's *Magisterial Synopsis*. The indictment is triable at Quarter Sessions, and is not removable by *certiorari* at the instance of the defendant (25 Geo. II. c. 36, s. 10). Where an informant under the Act of 1854, who has obtained a summons, does not appear to prosecute, the justices may authorise another person to proceed, or may dismiss the summons and authorise the laying of a fresh information (17 & 18 Vict. c. 38, s. 9). This applies to summary prosecutions what had been the practice in proceedings on indictment (*R.* v. *Wood*, 1831, 3 Barn. & Ald. 657).

Arrest and Entry.—Under the Act of 1541 (33 Hen. VIII. c. 9, s. 9), justices are empowered to enter gaming-houses within that Act. They were relieved from this obligation in 1728 (2 Geo. II. c. 28, s. 9; *Murphy* v. *Arrow*, *ubi supra*), and in 1845 empowered in places outside the metropolitan police district to issue special warrants on complaint made on oath that a place is reasonably suspected of being kept or used as a common gaming-house, authorising police officers to enter the place by force, if necessary, and to arrest every person found on the premises (8 & 9 Vict. c. 109, s. 3, Sched. 1). A similar power is given in the metropolis by written order of a commissioner of police made on a report in writing from a superintendent of police (ss. 6, 7). The warrant of justices and the order of a commissioner authorise search of persons arrested and search for all instruments of gaming (s. 7). Obstruction of police officers entering under these provisions is punishable on summary conviction (17 & 18 Vict. c. 38, s. 1).

Evidence.—As to the common law offence, proof of nuisance to neighbours is superfluous (*R.* v. *Rice*, 1866, L. R. 1 C. C. R. 21; *Jenks* v. *Turpin*, 1884, 13 Q. B. D. 505, at 515). Under the Act of 1845 (s. 5) it is superfluous to prove that anyone was found playing at a game for money wager or stake (cp. 2 & 3 Vict. c. 47, s. 49); and discovery of cards, dice, balls, counters, tables, or other instruments of gaming used in playing any unlawful game (see GAMES) is presumptive evidence that the house is a common gaming-house (1845, c. 109, s. 8). So is any obstruction of the police entering under a warrant, or proof of discovery of any means or contrivance for unlawful gaming, or for concealing, removing, or destroying any instruments of gaming (17 & 18 Vict. c. 38, s. 2).

Persons concerned in unlawful gaming who give evidence on a charge of keeping a gaming-house, and make true and faithful discovery, can obtain a certificate of exemption from prosecution for their part in the offence (8 & 9 Vict. c. 109, s. 9). And persons arrested in a gaming-house may be required to give evidence and compelled to answer criminating questions, on pain of committal for contempt. If they make true and faithful discovery, they are entitled to certificates of exemption from prosecution (17 & 18 Vict. c. 38, ss. 5, 6).

Penalties and Costs.—The penalties on summary conviction are leviable by distress (8 & 9 Vict. c. 109, ss. 4, 21; 17 & 18 Vict. c. 38, ss. 4, 7), or by committal in default of distress. The latter provision does not apply to costs when awarded. When recovered, the penalties under the Act of

1854 go half to the informer, half to the poor of the parish, subject to the very doubtful decision of *Wray* v. *Ellis*, 1858, 28 L. J. M. C. 46, as to the metropolitan police districts (see *R.* v. *Titterton*, [1895] 2 Q. B. 61).

[*Authorities.*—Hawk., P. C., bk. i. c. 75; 4 Black. *Com.* 171; Russell on *Crimes*, 6th ed., vol. i. pp. 741, 929; Archbold, *Cr. Pl.*, 21st ed., p. 1029; Steph. *Dig. Cr. Law*, 5th ed., pp. 141–144, 402.]

Gang Master.—See AGRICULTURAL GANGS.

Gaol.—See PRISONS.

Gaol Delivery.—See CIRCUITS AND ASSIZES.

Gaol Sessions.—In counties divided into ridings or divisions, which had distinct commissions of the peace (*i.e.* York and Lincoln), a Court of sessions for the management of the county gaols or houses of correction was formed out of all the justices in each commission, which had the administration of the gaols, etc. (5 Geo. IV. c. 12). The Prison Act, 1865 (28 & 29 Vict. c. 126, s. 5 (2)), defined the justices in gaol sessions as a prison authority under that Act. On the transfer of all gaols, etc., to the State in 1877 (40 & 41 Vict. c. 21, s. 5), the functions of gaol sessions ceased as to prisons. See PRISON.

Under the Local Government Act, 1888 (51 & 52 Vict. c. 41, ss. 46, 99, 118 (9)), the administrative business of gaol sessions was transferred to a joint-committee of the County Councils of the three administrative counties which make up each of the counties at large of Lincoln and York. This provision does not affect the control, if any, by justices in gaol sessions over police or lock-ups, which appears to fall within sec. 9 of the Act of 1888, but transfers the powers vested in the gaol sessions by 7 & 8 Vict. c. 92, s. 27. As to the districts of coroners, see CORONER. By an Act of 1897 (60 & 61 Vict. c. 39) each Riding of Yorkshire is made (from April 1, 1898) a distinct county for purposes of coroners.

Gardens.—As to allotments of gardens, see ALLOTMENTS. As to cottage gardens and compensation for improvements thereon, see *id.* vol. i. at p. 229; and LANDLORD AND TENANT, *Agricultural Holdings*, as to the principles on which such compensation is awarded. As to market gardens, see the article MARKET GARDENS. As to the protection of town gardens from encroachments, etc., see OPEN SPACES. As to field gardens (and recreation grounds), see FIELD GARDENS; sec. 164 of the Public Health Act, 1875, and secs. 44 and 45 of the adoptive Public Health Acts Amendment Act, 1890. See further, PUBLIC IMPROVEMENTS. As to criminal offences in connection with gardens, see such headings as FRUIT; ROOTS; TREE, etc.

Garnishee Order.—See EXECUTION, vol. v. p. 146.

Garrison Town.—See DEFENCE ACTS; FORTIFICATIONS.

Garrotting means strangling or attempting to strangle a person with the object of committing a felony (24 & 25 Vict. c. 100, s. 21). In addition to the punishment imposed under that section, as modified by 52 & 53 Vict. c. 69, s. 1, the Court may, under the Garrotters Act, 1813 (26 & 27 Vict. c. 44), order the offender to be once, twice, or thrice privately whipped. The instrument and number of strokes are to be specified in the sentence, and for offenders under sixteen the birch must be used (see CAT). The Act of 1863 deals also with robbery under arms, gang robbery, and robbery with violence.

Gas.—The explosion of gas in domestic use is treated as a fire risk within a policy of insurance.

The supply of gas like that of any other commodity, may freely be undertaken by any person. It is because of difficulties as to the acquisition of land, and of rights to disturb highways, and from the desire for a statutory monopoly and comparative immunity from proceedings for nuisance, that almost all gas works are erected under special Acts. Any interference with a highway to lay gas mains without statutory authority is a public nuisance, even if the consent of the highway authority has been obtained (*A.-G.* v. *Sheffield Gas Consumers Co.*, 1853, 3 De G., M. & G. 304; *R.* v. *Longton Gas Co.*, 1860, 2 El. & El. 651; *A.-G.* v. *Cambridge Gas Consumers Co.*, 1868, L. R. 4 Ch. 71; *Fullwood* v. *Preston* (*Mayor*), 1885, 53 L. T. 718; and see HIGHWAYS. It is also a violation of the rights of the owner of the soil of the highway which can be restrained by injunction (*Goodson* v. *Richardson*, 1874, L. R. 9 Ch. 221; *Tunbridge Wells* (*Mayor*) v. *Baird*, [1896] App. Cas. 434), and the mode of preparing gas for sale may involve incidentally or necessarily the creation of a public or private nuisance.

There is a good deal of public general legislation as to gas supply, viz. the Gasworks Clauses Acts, 1847 (10 & 11 Vict. c. 15) and 1871 (34 & 35 Vict. c. 41), the Sale of Gas Act, 1859 (22 & 23 Vict. c. 66), and the amending Act of 1860 (23 & 24 Vict. c. 146), and the Metropolis Gas Acts of 1860 (23 & 24 Vict. c. 125) and 1861 (24 & 25 Vict. c. 79), and the Public Health Acts, 1875 and 1890. All the statements hereafter made must be taken subject to the provisions of the special Acts, which modify in many details the general provisions.

At present the supply of gas is, as a general rule, effected (1) by commercial companies; or (2) by municipal authorities.

Commercial companies are formed under special Acts incorporating with modifications the Acts of 1847 and 1871. These Acts (1847, ss. 30–38, and 1871, s. 35) provide for limiting the profits of commercial gas supply and delivery of accounts to the local authorities for the purpose of checking these accounts and enforcing the limitations (*Dudley Gas Works* v. *Warmington*, 1881, 50 L. J. M. C. 67; *Leamington Priors Gas Co.* v. *Davis*, 1887, 18 Q. B. D. 107; *R.* v. *Hanley* (*Recorder*), 1887, 19 Q. B. D. 481).

Municipal Authorities.—The metropolitan authorities have not any power to supply gas in their districts. Each of the metropolitan companies has a monopoly in its own district (*Gas Light and Coke Co.* v. *South Metropolitan Gas Co.*, 1889, 62 L. T. 126). Under the Public Health Act, 1875, urban district councils (including town councils) are empowered to obtain a Local Government Board Order authorising them to supply gas within their district where no commercial supply exists (s. 161); and where a commercial supply exists, they may by special resolution, with the sanction of the Local Government Board, buy out the commercial

undertakers (ss. 63, 162) at a price to be fixed by arbitration in case of dispute.

Taking Land.—Whether the undertaking is commercial or municipal, the power to take lands or easements depends on the incorporation in the special Act or provisional order of the Lands Clauses Acts. But gas must not be stored except on lands described in the special Act or order (1871, c. 41, s. 5), and an easement of water may not be acquired (1871, c. 41, s. 10).

The Acts of 1847 and 1871 are Clauses Acts which have no independent operation, but apply only so far as they are incorporated in other Acts, general or special, under which the particular gas undertaking is authorised (cp. *Dartford Urban Council* v. *Bexley Heath Ry. Co.*, 1897, 14 T. L. R. 91).

Laying Pipes in Streets.—Besides the general regulations of the Act of 1847 (ss. 6–12), there are particular provisions as to London in Michaelangelo Taylor's Act, 1817 (57 Geo. III. c. xxix. ss. 13–18, 20; see 1847, s. 47), and the Act of 1860 (23 & 24 Vict. c. 125, ss. 49, 50). If the undertakers do not follow the statutory regulations, they are liable to indictment for obstructing the highway, as well as to summary proceedings under the Highway Act, 1835, s. 72, and the Public Health Act, 1875, s. 149. The pipes when laid may not be interfered with by local authorities, railway companies, or other breakers of streets, except under statutory provisions (see Michael and Will on *Gas and Water*, 4th ed., 22, 23); and the undertakers are entitled to sue for injuries caused by the negligence of the road authority (*Gas Light and Coke Co.* v. *Kensington Vestry*, 1885, 15 Q. B. D. 1).

Nuisance.—The Gas Works Clauses Act, 1847, does not give statutory authority to suppliers of gas to create a public nuisance (s. 29), and makes the undertakers subject to the provisions of Public Health Acts passed in the same session as the special Act or in a subsequent session (s. 49). The remedies in case of the creation of a public nuisance are—

(*a*) By indictment, whether air or water is polluted (*R.* v. *Medley*, 1834, 6 Car. & P. 292);

(*b*) By proceedings by the Attorney-General *ex relatione* for an injunction (*A.-G.* v. *Gas Light and Coke Co.*, 1877, 7 Ch. D. 217);

(*c*) By proceedings for penalties, where the undertakers corrupt or foul water by gas or through anything connected with its manufacture or supply (1847, ss. 21–23; Public Health Act, 1875, s. 68; Public Health (London) Act, 1891, s. 52; Met. Gas Act, 1860, ss. 51, 52; Lighting and Watching Act, 1833, s. 26). The remedy, under the Act of 1847, is either by action for a penalty of £200 and £20 a day for the continuance of the offence, or by summary proceedings (ss. 25, 40, 43) for a penalty of £20 by any person whose water is fouled.

They are also liable to daily penalties of £5 per diem, recoverable summarily, for any escape of gas permitted within twenty-four hours after notice (1847, s. 24). This remedy appears not to be exclusive, or to prevent action for damages consequent on the escape (*Burrows* v. *March Gas Co.*, 1872, L. R. 7 Ex. 96). But that decision appears to rest on a breach of contract as to the supply of proper meters and fittings; and except in case of breach of contract or negligence, the consumer appears to be confined to the statutory remedy; and a gas company does not fall within the rules in *Fletcher* v. *Rylands*, 1868, L. R. 3 H. L. 330 (see *Green* v. *Chelsea W. W. Co.*, 1894, 70 L. T. 547; and Beven on *Negligence*, 2nd ed., 473).

Supply.—The obligations of the undertakers as to supply are regulated by the Acts of 1847, ss. 13, 16, and 1871, ss. 11–27, as modified by special Acts, and in London by the Act of 1860 (23 & 24 Vict. c. 125, ss. 14–24).

The supply is by contract—(*a*) with ordinary persons or corporations, who, if owners or occupiers, can insist on supply (1847, s. 13; 1871, s. 11; *Ex parte Mason*, [1893] 1 Q. B. 323); (*b*) with local authorities (1847, s. 13; 1871, s. 24).

The price is regulated by the special Acts, subject to the provisions as to reduction by reference to the undertakers' profits.

A private consumer may be required to give security for the gas and fittings supplied (1871, ss. 11, 16; and in London, 1860, ss. 15, 16).

Persons who steal gas may be indicted for larceny (*R.* v. *White*, 1853, 22 L. J. M. C. 123), and fraudulent user is punishable summarily (1847, s. 18), as is wilful damage of pipes or fittings belonging to the undertakers (s. 19). Accidental damage must be paid for (s. 20).

The mode of supply is by meter tested and stamped under the Sale of Gas Acts, 1859 (c. 66), 1860 (c. 146), and 1861 (c. 79, Metropolis), and supplied and repaired by the undertakers (1871, ss. 13, 14, 17, 18, 19). Meters and fittings supplied are not valued in assessing the annual value of the building (*R.* v. *Lee*, 1866, L. R. 1 Q. B. 241), and are not distrainable for rent (1871, s. 18; *Gas Light and Coke Co.* v. *Hardy*, 1886, 17 Q. B. D. 619).

The undertakers have a right of entry to examine meters and ascertain the amount of gas consumed (1871, ss. 19, 21).

The record of supply given by the meter is *primâ facie* evidence of the quantity consumed (1871, s. 20), but the consumer is entitled to have the meter tested under the Sale of Gas Acts, 1859 (c. 66) and 1860 (c. 146), and in London by these Acts, as modified by the Act of 1861, c. 79.

These Acts provide for the appointment of gas inspectors, and their attendance to test meters by a standard, on the requisition of justices, or, in London, of the County Council.

The quality of the gas supplied is regulated by the Act of 1871, s. 12, and Sched. A., and in London by the Act of 1860 and the special Acts of the London companies (Hunt, *London Government*, vol. ii. p. 891), under which gas referees and examiners are appointed. Provision is made by the Act of 1871 (ss. 28–34) as to places for testing the purity of the gas.

If the consumer does not pay his gas rate the undertakers can cut off the supply (1847, s. 16), and take away the meter (1871, ss. 22, 23), and recover the amount summarily with the cost of cutting off (1871, ss. 23, 40, 41). They need not put the gas on again till the arrears are paid (1871, s. 39; *Paterson* v. *Gas Light and Coke Co.*, [1896] 2 Ch. 476).

If the undertakers do not give a supply at all, or fail to give one sufficient in amount and purity, they are liable to summary proceedings under sec. 36 of the Act of 1871, but not to action (*Clegg* v. *Earby Gas Co.*, [1896] 1 Q. B. 592; *Commercial Gas Co.* v. *Scott*, 1875, L. R. 10 Q. B. 400). Stoppage of pipes by frost is a defence to proceedings under sec. 36 (see *Richmond Gas Co.* v. *Richmond* (*Mayor*), [1893] 1 Q. B. 56).

The supply of gas to local authorities is regulated by the Acts of 1847, s. 13, and 1871, ss. 24–27, which provide for adjusting the price by agreement or arbitration. As to the effect of these sections, see the *Richmond* case (*supra*).

The powers of local authorities to light streets, etc., are dealt with under Lighting and Watching; London County; and Town Government.

[*Authorities.*—Michael and Will on *Gas and Water*, 4th ed.; Hunt, *London Local Government*, vol. ii. p. 981; Beven on *Negligence*, 2nd ed., p. 460.]

Gavelkind—A custom of descent prevailing with regard to lands in certain places, chiefly, but not exclusively, in Kent (see *Wiseman* v. *Cotton*, 1675, 1 Sid. 135, 137), whereby instead of descending to the eldest son the lands descend to all the sons equally, in default of sons to all the daughters equally, and in default of children to all the brothers equally; the issue of a deceased son, daughter, or brother who, if living, would have been entitled to partake, being also entitled *per stirpes* to the share of their deceased parent. Outside Kent the custom must in regard to collateral descents be proved as a special custom. The word, however, seems most probably etymologically to mean only land of the kind that yields a rent or a customary performance of husbandry works (Old English, *gafol* or *gavel*), that is practically land which elsewhere was described as being held in socage: and on this theory the rule of descent and other peculiarities of the custom are extrinsic additions, gavelkind land originally differing in name only from other socage lands. In any case gavelkind lands were never held by any peculiar tenure, but only by a species of socage: the custom being one of descent only. In Kent, unless the contrary be shown, all lands are still presumed to be under the custom of gavelkind; and although by various Acts of Parliament, the first of which was passed in 1496 and the last in 1624, specified lands were disgavelled, or placed as regards descent under the common law of inheritance, the presumption above mentioned gradually undoes the effect of the Acts, since it becomes increasingly difficult to show that specified lands are included in a specified Act; and a direction in a deed or will that the lands shall descend to the common law heir will not alter the course of descent; nor does the Inheritance Act of 1833 (3 & 4 Will. IV. c. 106) affect the existence of the custom of gavelkind (*Muggleton* v. *Barnett*, 1857, 2 H. & N. 653). The important peculiarities of gavelkind other than the rule of descent are (1) that gavelkind lands did not escheat on attainder for any felony, though they were forfeited for high treason; (2) that an infant, male or female, not under fifteen years of age, may indefeasibly alienate them by feoffment, at least for valuable consideration; (3) that the dower of them is of a moiety, but ceases on remarriage or incontinence; (4) that the tenancy by the curtesy is of a moiety only, and ceases on remarriage, but attaches without birth of issue (see also CURTESY). These further peculiarities are rare outside Kent. The disgavelling Acts affect the custom of descent only.

[*Authorities.*—Robinson on *Gavelkind*, 5th ed., 1897; Challis, *Real Property*, 2nd ed., 1892.]

Gazettes.—The *London Gazette* is a Government newspaper, which appears every Tuesday and Friday, and is the official organ for the publication of royal proclamations, Government orders and regulations, and other public notices, such as dissolutions of partnership and proceedings in bankruptcy.

The *London Gazette* dates back to 1666. Prior to that date there had been several newspapers which, to some extent, were official organs, but most of these were shortlived. In November 1665 the first number of the *Oxford Gazette* appeared,—it was so called because the Court was then at Oxford owing to the prevalence of the plague in London,—but after the issue of several numbers the title was changed to that of the *London Gazette*. Originally, the paper, although the organ of the Government, partook also of the character of an ordinary newspaper, supplying a few

items of general news; for long, however, the *Gazette* has existed merely as a medium for official and other public notices.

At common law the *Gazette* is evidence of acts of State notified therein, but not of acts of public officials having little or no reference to the affairs of Government, nor even of many public matters in suits between individuals (Taylor, *Law of Evidence*, 9th ed., ss. 1662, 1665); but the use of the *Gazette* for evidential purposes has been much extended by statute.

By the Documentary Evidence Act, 1868, s. 2, *primâ facie* evidence of royal proclamations and Government orders and regulations may be given by production of a copy of the *Gazette* containing the same. A cutting from the paper is not sufficient; the whole *Gazette* must be produced (*R.* v. *Lowe*, 1883, 52 L. J. M. C. 122).

By the Bankruptcy Act, 1883, a copy of the *London Gazette* containing any notice inserted therein in pursuance of the Act is evidence of the facts stated in the notice, and a copy of the *Gazette* containing any notice of a receiving order or adjudication order is conclusive evidence in all legal proceedings of such an order having been made and of its date (s. 132). By the same Act, and the rules made thereunder, a large number of proceedings in bankruptcies are required to be advertised in the *Gazette*, such as receiving orders, orders of adjudication, appointment of trustee, approval of composition, orders of discharge, notices of dividends, etc.

Notice of dissolution or change of partnership advertised in the *Gazette* is notice of the fact of such dissolution or change to persons who have not dealt with the firm before the date of the dissolution or change so advertised (Partnership Act, 1890, s. 36). In *Troughton* v. *Hunter*, 1854, 18 Beav. 470, the defendant in a suit for dissolution of partnership was ordered to concur in procuring the insertion of a notice of dissolution in the *Gazette*; and in *Hendry* v. *Turner*, 1886, 32 Ch. D. 355, it was decided that the Court has jurisdiction to compel a retiring partner to sign a notice of dissolution for the *Gazette* even where no other specific relief is claimed.

Under certain other statutes production of a copy of the *Gazette* is made evidence of the matters published therein (see Taylor, *Law of Evidence*, 9th ed., ss. 1663A–64).

In addition to the *London Gazette*, there are two others—the *Edinburgh Gazette* and the *Dublin Gazette*—in which public notices affecting Scotland and Ireland respectively are published. The provisions of the Documentary Evidence Act, 1868, referred to above, apply to these *Gazettes* in the same way as to the *London Gazette*.

Geese, though not generally commonable animals, may, by special custom, which exists in very many places, enjoy common of pasture whether the land be manorial or not, but not in a forest. See Hunter on *Open Spaces*, pp. 33, 48, 162. See Animal; Birds.

General Agent.—See Principal and Agent.

General Average.—See Average.

General Building Scheme.—Where land is sold in lots subject to restrictions affecting the whole of the land, the land is said to be

governed by a "general building scheme" if the restrictions were imposed not for the benefit of the vendor alone, but for that of the purchasers, and were intended to affect the rights of the purchasers *inter se*. It is not necessary that the different purchasers should execute, or agree with the vendor to execute, a mutual deed of covenant; nor is it necessary that the vendor should expressly agree that each purchaser shall have the benefit of the restrictive covenants entered into by the other purchasers with the vendor (*Renals* v. *Cowlishaw*, 1878, 9 Ch. D. 125; 11 Ch. D. 866). It is enough if the facts of the case make it obvious that the restrictions were imposed for the common benefit of all the purchasers. The rights of the purchasers are not affected by the fact that in the result part of the land is not sold; they have the same rights against the vendor in respect of the unsold part as they would have had against the purchaser of that part if it had been sold.

If on a sale by auction the vendor retains no land adjoining the land offered for sale, the inference is that the restrictions were intended for the benefit of the purchasers *inter se* (*Nottingham, etc.* v. *Butler*, 1886, 16 Q. B. D. 778). But the mere fact that the vendor retains adjacent land does not raise the inference that the restrictions were intended only for the vendor's benefit (*Birmingham, etc., and Allday*, [1893] 1 Ch. 342).

A condition reserving to the vendor the right of selling unsold lots free from the restrictions will be effectual to prevent the purchasers of the lots sold from setting up a general building scheme affecting the unsold lots (*Sidney* v. *Clarkson*, 1864, 35 Beav. 118).

A general building scheme may be proved not only on a sale by auction, but also where the different lots are sold at different times by private contract, and also where the different lots are not sold but leased. *Spicer* v. *Martin*, 1888, 14 App. Cas. 12, was a case of leasing. The production to a purchaser of a plan of a building estate comprising his lot and other lots, and the use of a printed form of agreement containing blanks and adaptable to different lots is not sufficient to entitle the purchaser to assume that the estate is governed by a general building scheme (*Tucker* v. *Vowles*, [1893] 1 Ch. 195). But a statement made to an intending purchaser by the vendor that similar restrictions are contained in the other purchasers' conveyances is evidence of a general building scheme, and entitles that purchaser to restrain the vendor from authorising the restrictions to be disregarded in the case of the other lots (*Spicer* v. *Martin*, 1888, 14 App. Cas. 12).

General District Rate.—See PUBLIC HEALTH.

General Exceptions.—See BILLS OF LADING, vol. ii. p. 120; CHARTER-PARTY, vol. ii. p. 488.

General Exceptions (in Criminal Law).—Under this head are classified in the Indian Penal Code (ss. 76–106), Sir James Stephen's *Digest of the Criminal Law*, 5th ed., pp. 20–29, and the abortive Criminal Code Bills introduced in 1879, a series of provisions which must be read along with every subsequent substantive portion of the Code or Digest, and which point out how acts which in terms come within the definition of an offence are in substance excepted therefrom as being either

justifiable or exempt from punishment. Such are acts by persons mentally or physically incapable of any crimes or of certain crimes: mistakes of fact which include criminal intention, exercise of public or private rights or duties which justify or excuse the persons exercising them, against any criminal proceeding for consequent death or injury. See Steph. *Dig. Cr. Law*, 5th ed., 20–29; and Mayne, *Ind. Cr. Law*, 1896, 41–54, 295–428, where the subject is admirably handled, with reference both to English and Indian law. See HOMICIDE; IDIOT; LUNACY.

General Issue.—This was the term applied to the plea formerly used for traversing the declaration in cases where the defendant wished to deny its whole allegations or the principal fact on which it was founded (Stephen on *Pleading*, 7th ed., p. 152). Before the pleading rules of Hilary Term, 1834, came into force, this plea operated as a general denial of the defendant's liability, and enabled him not only to put the plaintiff to the proof of the whole of his case, but to raise under it almost every sort of defence on his own part (Bullen and Leake's *Precedents of Pleading*, 3rd ed., p. 460). By the last-mentioned rules, and by the rules of Trinity Term, 1853, the effect of the general issue as a traverse was materially restricted, and all matters in confession and avoidance had to be specially pleaded (*ibid.*). The usual forms of general issues in actions on contracts previously to the Judicature Acts were called *nunquam indebitatus*, *non assumpsit*, *non est factum*, and *nul tiel record*. The plea of *nunquam indebitatus* was used in pleading to an *indebitatus count* (see COUNT IN DECLARATION); *non assumpsit* was pleaded where the declaration was framed on a like contract in a special count on *assumpsit* (see ASSUMPSIT); *non est factum* was the form of traverse employed where the action was founded on a specialty contract; and *nul tiel record* was used where it was founded on a contract of record. In actions for wrongs, the most common form of the general issue was "Not guilty" (see NOT GUILTY), but in some such actions a more specific traverse was adopted, as, for instance, in detinue, where the general issue usually pleaded was *non detinet* (see DETINUE), and in replevin, where it took the form of *non cepit* (see REPLEVIN). Besides the ordinary general issue of "Not guilty," there was also a special defence of "Not guilty" by statute, which applied in cases where a defendant was privileged by statute to plead "Not guilty," and to give in evidence thereunder defences which would otherwise require to be pleaded (Bullen and Leake's *Precedents of Pleading*, 3rd ed., p. 704).

The effect of the rules under the Judicature Acts has been, except in the case of "Not guilty by statute," practically to abolish the pleading of general issues; for though the defendant may, under the authorised forms, plead that he did not contract, or promise, or agree as alleged, such denials have not the effect of the old plea of *non assumpsit* (see Bullen and Leake's *Precedents of Pleading*, 5th ed., p. 549). Even the right of pleading the general issue of "Not guilty by statute" is very much limited by the effect of the repeals contained in the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), and other statutes (see *ibid.* 930).

General Line of Buildings.—See LONDON (COUNTY) *Buildings*.

Generally.—As to the scope of this term in the words "generally do all such acts and things in relation to his property as may reasonably be required," in sec. 24 (2) of the Bankruptcy Act, 1883, see *In re Betts & Block* (1887, 19 Q. B. D. 39; affd. 13 App. Cas. 576), dealt with in article BANKRUPTCY, vol. i. at p. 506.

General Orders.—See RULES OF COURT.

General Ship.—See AFFREIGHTMENT.

General Tail.—See ESTATES OF INHERITANCE.

General Warrant.—In 1627, in *Sir John Darnel's* case, and in 1629, in *Stroud's* case, the question was raised whether arrests on warrants expressed to be *per speciale mandatum regis*, for notable contempts, were a good return to a writ of *habeas corpus* (3 How. St. Tr. 5, 241). By the Petition of Right (1627, 3 Chas. I. c. 1, s 5; 1640, 16 Chas. I. c. 10), the illegality of warrants by the king's special command, not assigning grounds of arrest or detainer, was admitted by the Crown, and the remedy by *habeas corpus* made effectual. Notwithstanding this enactment, a practice was in vogue as late as 1765 for a Secretary of State, on the assumption that he was qualified to do so as a conservator of the peace, to issue warrants to search for, and seize papers, on charges of seditious libel. In *Wilkes* v. *Wood*, 1763, 19 How. St. Tr. 1153; *Leach* v. *Money*, 1765, 19 How. St. Tr. 1001; and *Entick* v. *Carrington*, 1765, 19 How. St. Tr. 1029, this proceeding was declared to be illegal, Lord Camden denying the Secretary of State to be a common law magistrate (see 18 Geo. II. c. 20, ss. 13, 14), and determining that it is illegal for any person to issue or execute any warrant for seizure of papers of any person on a charge or suggestion of seditious libel. In 1766 the House of Commons passed a resolution condemning general warrants in the case of libels, and declaring their execution on a member of the House to be a breach of its privileges, and since 1776 (Dicey, Broom, *Const. Law*, 2nd ed., 610) no attempt seems to have been made to seize papers by warrant of the Privy Council or Secretary of State. Lord Mansfield (19 St. Tr. 1027) specifies as an exception to the rules about warrants, those known as writs of assistance (authorising entry of houses to search for uncustomed goods), and warrants to take up loose, idle, and disorderly people, which appear to have been issued in general terms. The Acts as to the latter have been superseded by the procedure under the Vagrants Acts, and police in towns. The use of the writ of assistance was one of the causes of the revolt of the American colonies (see Bouvier, *Law Lex. s.v.* "General Warrant").

Warrants to arrest persons to be legal must name or describe sufficiently the person to be arrested, and state his offence with reasonable particularity (*Jones* v. *German*, [1896] 2 Q. B. 418; [1897] 1 Q. B. 374). And see Dicey, *Const. Law*, 2nd ed.

General Words.—See EASEMENT: INCORPOREAL HEREDITAMENTS INTERPRETATION.

Geneva Convention—An international agreement concluded August 22, 1864, at Geneva, for the purpose of improving the condition of wounded soldiers of armies in the field ("pour l'amélioration du sort des militaires blessés dans les armées en campagne"). The movement of which it was the outcome sprang from a book, *Un souvenir de Solférino*, on the sufferings of the wounded at Solferino, published in 1862 by the Genevese philanthropist, Henri Dunant. An unofficial congress at Geneva in October 1863 was followed by an official one, called by the Swiss Government in 1864, in which sixteen States took part. Great Britain was not represented, but the articles adopted were agreed to by her at a later date. They were first applied in the Austro-German war of 1866. After the experience therein acquired, fifteen further articles explaining and completing certain provisions of the original Convention, and extending its application to maritime warfare, were adopted by another official conference held at Geneva on October 20, 1868. These additional articles were by agreement put in practice by the French and German armies in the war of 1870, but were not found workable, and have never yet been ratified. The principles of the original convention are contained in the first seven articles, which are as follows:—

Art. 1. Ambulances and military hospitals shall be acknowledged to be neuter, and as such shall be protected and respected by belligerents so long as any sick or wounded may be therein. Such neutrality shall cease if the ambulances or hospitals should be held by a military force.

Art. 2. Persons employed in hospitals and ambulances comprising the staff of superintendence, medical service, administration, transport of wounded, as well as chaplains, shall participate in the benefit of neutrality while so employed and so long as there remain any wounded to bring in or succour.

Art. 3. The persons designated in the preceding article may even, after occupation by the enemy, continue to fulfil their duties in the hospital or ambulance which they serve, or may withdraw in order to rejoin the corps to which they belong. Under such circumstances, when these persons shall cease from their functions they shall be delivered by the occupying army to the outposts of the enemy.

Art. 4. As the equipment of military hospitals remains subject to the laws of war, persons attached to such hospitals cannot, in withdrawing, carry away any articles but such as are their private property. Under the same circumstances an ambulance shall, on the contrary, retain its equipment.

Art. 5. Inhabitants of the country who may bring help to the wounded shall be respected and shall remain free. The generals of the belligerent Powers shall make it their care to inform the inhabitants of the appeal addressed to their humanity, and of the neutrality which will be the consequence of it. Any wounded man entertained in a house shall be considered as a protection thereto. Any inhabitant who shall have entertained wounded men in his house shall be exempted from the quartering of troops, as well as from a part of the contributions of war which may be imposed.

Art. 6. Wounded or sick soldiers shall be entertained and taken care of, to whatever nation they may belong. Commanders-in-chief shall have the power to deliver immediately to the outposts of the enemy soldiers who have been wounded in an engagement when circumstances permit this to be done, and with the consent of both parties. Those who are recognised, after their wounds are healed, as incapable of serving shall be sent back to their country. The others may also be sent back on condition of not again bearing arms during the continuance of the war. Evacuations, together with the persons under whose directions they take place, shall be protected by an absolute neutrality.

Art. 7. A distinctive and uniform flag shall be adopted for hospitals, ambulances, and evacuations. It must on every occasion be accompanied by the national flag. An arm-badge (brassard) shall also be allowed for individuals neutralised, but the delivery thereof shall be left to military authority. The flag and arm-badge shall bear a red cross on a white ground.

By Art. 8 the details of execution of the Convention are put in the hands of commanders-in-chief of belligerent armies, subject to instructions from their respective Governments.

The general tenor of the Convention, it has been seen, is to neutralise all persons and things appertaining to the care of the sick and wounded in war.

It is sometimes supposed that the Geneva Convention was the first international effort made for the protection of the wounded in war. This is a mistake. No fewer than three hundred military agreements having the same object as the Geneva Convention were concluded on different occasions between 1581 and 1864 (see Gurlt, *Zur Geschichte der internationalen und freiwilligen Krankenpflege im Kriege*, 1873). The great importance of the Geneva Convention is the now practically universal acceptance of its principles. The following are the States which down to September 1897 have joined the Convention:—Argentina, Austria-Hungary, Belgium, Bolivia, Bulgaria, Chili, Congo, Denmark, France, Germany, Great Britain, Greece, Holland, Italy, Japan, Montenegro, Norway, Orange Free State, Peru, Persia, Portugal, Roumania, Russia, San Salvador, Servia, Siam, Spain, Switzerland, Transvaal, Turkey, United States, and Venezuela. Of these all possess Red Cross Societies except Bolivia, Chili, Orange Free State, Persia, San Salvador, Siam, and Transvaal.

The countries which are signatories to the Geneva Convention periodically hold official and diplomatic meetings to consider reforms desirable in the terms of the Convention. The last such meeting took place at Vienna in September 1897, and was attended also by delegates from the various Red Cross Societies. The most important subject in connection with the Convention has remained its application to maritime warfare. Hitherto the opposition of England to any international agreement, which might hinder her freedom of action on the sea, has stood in the way of such an arrangement.

[*Authorities.*—*Holtzendorff's Handbuch des Völkerrechts*, Hamburg, 1889, vol. iv.: Prof. Lueder's article on *War and the Law of War*, pp. 290 *et seq.*; Moynier, *Notions Essentielles sur la Croix-Rouge*, Geneva, 1896, and *Considérations sur la sanction penale à donner a la Convention de Genève*, Lausanne, 1893; Brusa, *Convenzione Ginevrina*, Torino, 1896; Lawrence, *International Law*, London, 1895; Walker, *Science of International Law*, London, 1893; *Le Service de Secours de la Société de la Croix Rouge de Japon*, Paris, 1897.]

Gentleman; Gentlewoman.—Lord Coke, treating of additions or correct legal descriptions of persons in legal proceedings, speaks of "gentleman" as the proper addition of those bearing arms. This right of bearing arms gives the right to the title gentleman, *generosus*, *gentilhomme*. The Norman-French word translates the Latin *gentilis homo*, and the latter phrase relates to that *jus imaginum* of the Roman *gentes* which in later times was represented by the right to use armorial bearings by those who were of the nobility. To this rank belonged both gentleman and esquire, between whom, says Coke, there is small difference. A woman having this same right was entitled to be described as gentlewoman, and could abate writs, etc., if she were described, *e.g.*, as spinster, a word which would describe an occupation and not a degree; and to her proper addition the gentlewoman was as well entitled as the baronesse or duchesse (Coke, *Inst.* Pt. II. vol. ii.).

According to Selden (*Titles of Honour*, p. 852), "A gentleman is one that either from the blood of his ancestors, or the favour of his soveraigne, or of those that have the vertue of soveraigntie in them, or from his own vertue, employment, or otherwise, according to the customes of honour in his

countrie, is ennobled, made gentile, or so raised to an eminencie above the multitude, that by those lawes and customes he be truly *nobilis*, or noble, whether he have any title or not fixed besides on him." This corresponds with Coke's description.

But there is a wider sense in which the word loses any legal signification it might have, and this is the sense in which Blackstone (*Com.* bk. i. p. 406) understands the meaning. He quotes Sir Thomas Smith (*De Rep. Ang.* lib. i. cc. 20, 21) as follows:—"As for gentlemen, they be made good cheap in this kingdom; for whosoever studieth the laws of the realm, who studieth in the universities, who professeth liberal sciences, and (to be short) who can live idly and without manual labour, and will bear the port, charge, and countenance of a gentleman, he shall be called master, and shall be taken for a gentleman."

In *Allen* v. *Thompson*, 1856, 25 L. J. Ex. 249, Pollock, C.B., quoted this in pointing out that the description in a bill of sale under the Act of 1854 (17 & 18 Vict. c. 36) of the assignor as a "gentleman," was no description of occupation; and it was held that if an assignor had any office or occupation, it was not a sufficient description to term him simply a "gentleman." For other cases of a similar kind, see Weir on *Bills of Sale*, pp. 207–209.

Where an affidavit of fitness of a person to act as a trustee of the will of a deceased lunatic described the deponent as a "gentleman," the Court would not receive it nor allow the costs (*In re Orde*, 1883, 24 Ch. D. 271). See also ARMORIAL BEARINGS; ESQUIRE; HERALDRY.

[*Authorities.*— Coke, Selden, Blackstone (*supra*), and Weir, *Bills of Sale.*]

Gentleman Usher of the Black Rod.—See BLACK ROD, GENTLEMAN USHER OF THE.

Geological Survey.—By the Geological Survey Act, 1845, s. 1, power is conferred upon duly authorised surveyors and their assistants to enter upon any land (after giving notice in writing to the owner or occupier of their intention to do so) for the purpose of making and carrying on any geological survey. Power is likewise given to them to break up the surface of the land in order to ascertain the nature of the rocks, strata, or minerals beneath the same, and also to take away specimens, and, under certain restrictions, to fix posts or other marks. These powers can be exercised at any reasonable time in the day. As little damage as possible is to be done, and satisfaction is to be made to the owner or occupier for any injury caused, the amount of which, in case of dispute, is to be determined by two or more justices in petty sessions assembled. Sec. 2 imposes penalties on persons resisting or obstructing the work of the survey, or who remove or destroy any post or mark.

The power to authorise surveyors to carry out such surveys given by the Act of 1845 to the First Commissioner of Her Majesty's Woods, Forests, etc., was transferred by the Crown Lands Act, 1851, to the Commissioners of Works and Public Buildings.

Gestation.—This subject is of importance in cases of AFFILIATION and LEGITIMACY. Some medico-legal notes on the point will be found in the article MEDICAL JURISPRUDENCE.

Gibbet.—See GALLOWS. It was used to expose the dead body of a malefactor when the Court could lawfully add that ignominy to the capital sentence.

Gibraltar.—A fortress on the south-west coast of Spain, captured in 1704, ceded to Great Britain by the Treaty of Utrecht in 1713, organised as a colony within the meaning of the Interpretation Act, 1889 (see the article COLONY). The governor, who is also the general commanding the garrison, exercises all functions of legislation and government; there is no Executive or Legislative Council. The first charter of justice was issued in 7 Geo. I.; it applied to personal property only; the effect of subsequent charters, as explained in *Jephson* v. *Riera*, 1833, 3 Kn. 130, is to make the English law, so far as it is applicable, the measure of justice in all cases. See the charter of justice of 1st September 1830, in Clark, *Colonial Law*, 680; Order in Council, 17th November 1888; and on the jurisdiction of the Supreme Court as a Court of law and equity, *Larios* v. *Gurety*, 1874, L. R. 5 P. C. 346. There is an appeal from the Supreme Court of Gibraltar to the Queen in Council. See PRIVY COUNCIL.

[*Authorities.*—See the authorities cited above, and the Gibraltar *Ordinances.*]

Gift; Give.—The word is equally applicable to the transfer of real or personal property, and such gifts may be either by word or writing or deed. Gifts are to be distinguished from grants in that they are gratuitous: for the law as to gifts of personalty the reader is referred to DONATIO INTER VIVOS; DONATIO MORTIS CAUSÂ.

As to "gifts" of land the older writers say that a conveyance by "gift" (called *donatio*) is applicable only to the creation of an estate tail just as the conveyance by feoffment to an estate in fee, and lease to an estate for years. The operative words in such a conveyance are *do* or *dedi*. This distinction is exemplified by Littleton's classification into (1) feoffor and feoffee; (2) donor and donee; (3) lessor and lessee (see Shep. *Touch.* 227). Gifts of real estate are generally called voluntary conveyances. See VOLUNTARY CONVEYANCES.

An important feature in the use of the word *give* in a conveyance was the implied warranty in law. The old learning on this subject will be found in detail in the note in *Co. Lit.* 384 *a*, by Hargrave and Butler. It will be sufficient here to say that before the passing of the Real Property Act of 1845 (8 & 9 Vict. c. 106) it was thought that the word *give* in a conveyance implied in law a general warranty of title. But sec. 4 of the Act provides that the word "give" or the word "grant" in a deed executed after 1st October 1845 shall not imply any covenant in law in respect of any tenements or hereditaments, except so far as the word "give" or the word "grant" may by force of any Act of Parliament imply a covenant.

None of the writers mention any Act of Parliament by force of which the word "give" implies a covenant. It would seem, therefore, that the latter part of the section applies only, for practical purposes at all events, to the word "grant." See GRANT: for "gift over," "gift by implication," see WILLS; FIDUCIARY RELATIONSHIP; UNDUE INFLUENCE.

Gin.—1. See SPIRITS.

2. A contrivance for taking game. See GAME LAWS. It is illegal to set it if it is in the nature of a man-trap. See BODILY HARM, vol. ii. p. 205.

Given.—"Goods, materials, or provisions ordered to be *given* in parochial relief to any person in a parish or union . . ." in sec. 77 of 4 & 5 Will. IV. c. 76, held in *Davies* v. *Harvey*, 1874, L. R. 9 Q. B. 433 (quoted in Stroud), to include goods *lent* gratuitously; and goods therefore which are lent and remain the property of the guardians are none the less *given* in parochial relief within the meaning of that statute. See GIFT; GIVE; GRANT; NOTICE.

Glanders—An incurable disease to which horses are subject, which is infectious and dangerous to human life (*Baird* v. *Graham*, 1852, 14 Dunlop (Sc.) 615; Oliphant on *Horses*, 5th ed., 80, 81). By general order of October 29, 1894 (St. R. & O., 1894, No. 388), the Board of Agriculture have under the powers of sec. 22 (xxxv., xxxvi.) extended the definition of the term "disease" in the Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), so as to include glanders and farcy.

Independently of this order, it is an indictable nuisance knowingly to bring a glandered horse into a public place (*R.* v. *Henson*, 1852, Dears. C. C. 24). See HORSES.

Glass.—As to larceny of, see FIXTURES. As to carriage of glass, see CARRIER, vol. ii. at p. 388. "Glassworks," *i.e.* any works in which the manufacture of glass is carried on, are "non-textile" factories (Factory and Workshop Act, 1878 (41 & 42 Vict. c. 61), Schedule IV. 1, par. 15). See FACTORIES AND WORKSHOPS.

Glass-houses.—Land covered with "glass-houses" built for the purpose of growing produce for sale, is within the exception of "market gardens" from the levy of the general district rate on the full annual value of premises under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 211 (*Purser* v. *Local Board for Worthing*, 1887, 18 Q. B. D. 818). See further, MARKET GARDENS, and, as to the removal of glass-houses, FIXTURES.

Glebe; Glebe Lands.

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HISTORICAL INTRODUCTION AND DEFINITION.

The glebe is the piece of land assigned to the incumbent of a parochial benefice, including a perpetual curacy and parochial chapelry. It is

described as the dowry of the church, because it is supposed to support the incumbent, and at canon law was free from every service. Lindwood, p. 255, gives the following definition: "*Terra in quâ consistit Dos ecclesiæ: et sic hic gleba ecclesiæ sumitur pro dote ecclesiæ, quæ erit prorsus libera.*" The glebes probably constitute the oldest parochial endowments of the Church, and are certainly anterior to TITHES. The bestowal of a little estate on the church of the township was probably the most usual way of providing the parochial priest with an endowment independent of voluntary gifts. From a very early date the church was held of common right entitled to a house of residence for the priest and glebe, so that unless they were provided no church could be legally consecrated. Both house and glebe were comprised by the canonists in the one word *mansus* or manse, and the rule of the canon law is "*Sancitum est ut unicuique ecclesiæ unus mansus integer absque ullo servitio tribuatur.*" The close connection which the canonists assume between the glebe and the parsonage house is still retained in law. It is considered that the surplus profits arising from the glebe are a fund to keep the parsonage house in repair, and therefore when glebe lands are purchased by a railway company under their statutory powers, the Court has jurisdiction, with the consent of the bishop and patron, to apply the money for improvements or additions to the parsonage house; but the money in such a case will be paid to the bishop's secretary, and not to the incumbent (*Ex parte Rector of Claypole*, 1873, L. R. 16 Eq. 574); while such moneys may not be employed on repayment to Queen Anne's Bounty or the repair of the chancel (*Ex parte Rector of Grimoldby*, 1876, 1 Ch. D. 225).

Although many parsonage houses no longer possess glebes, yet, even in the present century, Acts have been passed (see *post*) for providing suitable glebe lands for incumbents. For the purposes of the Glebe Lands Act, 1888, glebe is defined as including any land and tenement forming part of a benefice; see also *In re Randell*, 1888, 57 L. J. Ch. 899.

THE NATURE OF AN INCUMBENT'S ESTATE IN THE GLEBE.

The fee-simple in the glebe is said to be in abeyance, as a thing existing in the remembrance, intendment, and consideration of the law. Whenever a clergyman is instituted and inducted to an ecclesiastical living, he takes an estate therein of the nature of a fee-simple qualified (Lyttleton, *Tenures*, 646, 647; Coke, *Inst.* 341 *a*), but this estate he takes only for the purpose of protecting the rights of the church and of his successor. So far as he may do anything to their prejudice, the law adjudges him to take only a life estate (see further, article ECCLESIASTICAL CORPORATIONS). So soon as a clerk is inducted and instituted into a living, the freehold estate in the glebe of the nature above mentioned rests at once on him, and will remain with him so long as he is incumbent *de facto*, that is to say, although he has no title to the living, or has done some act for which at canon law he is *ipso jure* deprived thereof; for until he is removed he remains incumbent *de facto*, and as such is liable to do all the burdens and duties of the living, and thus in equity must be regarded as entitled to the profits (*Halton* v. *Cove*, 1830, 1 Barn. & Adol. 538). At common law the rights of the church were considered to be protected by its temporal and spiritual guardians, the patron, and the ordinary. If an incumbent attempted to charge or alienate his glebe—and waste is a form of alienation—he was liable to deprivation by a constitution of Stephen Langton, Archbishop of Canterbury: Lind. p. 149. With their licence precedent or confirmation subsequent, it, however, appears that he could commit waste upon it, or charge and alienate it in

such a way as to bind his successors; and it is even said that, although the fee-simple is certainly not in them, the patron and ordinary, supposing the former to be seised of the advowson in fee, acting together during the vacation of the benefice could charge the glebe and other revenues of the church in such a manner as to bind future incumbents; but if the bishop himself was patron, he could not act without the confirmation of his DEAN AND CHAPTER.

The remedies against an incumbent in respect of waste to his glebe are—

(1) A writ for PROHIBITION at common law;

(2) A suit for WASTE in the Ecclesiastical Court;

(3) An injunction in equity.

As to (1), however, the Court of Common Pleas in *Jefferson* v. *Bishop of Durham*, 1797, 1 Bos. & Pul. 105, held that it had no power to issue the writ against a bishop, at anyrate at the suit of a party who had no interest, and this judgment would on many points apply to the case of a parochial incumbent. As to (2), Lord Coke states that waste against a parson (*e.g.* felling of trees) is sufficient ground for deprivation; but such a sentence would probably not be passed in the present day, unless the waste was of a very serious kind (see *Bagg's* case, 1616, 13 Jac. I. 11 Co. Rep. p. 174). As to (3), an injunction is probably at the present time the readiest means of interfering to check the committal of waste.

Owing to the nature of ecclesiastical estates, and the difficulty of preventing waste, and of finding persons sufficiently interested to intervene, the Courts have allowed persons who have even a very small interest in the matter to bring actions to check waste, and it is not necessary for them to have any estate in the glebe. The patron is the person who has the primary right to sue in the Courts to restrain such waste or alienation; the ordinary may also apply in a proper case, as where there is collusion between the patron and incumbent; and in case of need, the metropolitan, the Crown, and, when they have an interest in the matter, the ECCLESIASTICAL COMMISSIONERS may obtain injunctions to prevent waste or alienation (*Ross* v. *Adcock*, 1868, L. R. 3 C. P. p. 655; *Ecclesiastical Commissioners* v. *Wodehouse*, [1895] 1 Ch. 552). No action, however, lies against an incumbent or his executors at the suit of his successor in respect to waste of the glebe (as to this, see further *Ross* v. *Adcock*, *supra*, and article ECCLESIASTICAL DILAPIDATIONS). The disabling statutes, as they are called, of Elizabeth, namely, 13 Eliz. c. 10, 13 Eliz. c. 20, 14 Eliz. c. 11, make all alienation of ecclesiastical property by any ecclesiastical corporations, except certain leases (as to which, see articles ECCLESIASTICAL COMMISSIONERS and LEASES, ECCLESIASTICAL), even if made with the proper consents, to be null and void. Waste, as has been stated, is alienation, and therefore will be restrained under these Acts. (The question as to how far leases given by ecclesiastical corporations since these Acts are void, or only voidable, is treated in article LEASES, ECCLESIASTICAL.)

In modern times certain further restrictions have been placed by statute on incumbents; but facilities have at the same time been given for the working of mines upon or the sub-leasing or mortgage of the glebe, when the same can be shown to be for the interests of the living. These statutes will be considered under the different subdivisions (and see also article LEASES, ECCLESIASTICAL).

WASTE.—See WASTE.

WORKING OF MINES, ETC., ON GLEBE LAND.

At common law the incumbent possessed the right to work mines on the glebe lands, with the consent of the patron and ordinary. If such

sanction has been obtained, it would appear that he may still work mines which were open before 1571, the date of the Act 13 Eliz. c. 10. As that Act had prohibited all alienation except by way of certain leases which could not apply to the case of a new mine, no mine could be lawfully opened or worked on glebe lands, although an incumbent might continue the working of mines already open, and the living might be endowed with lands on which there were open mines which could be worked. If a mine is wrongfully opened by an incumbent, this fact will not justify his successor in continuing to work it.

The *Countess of Rutland's* case, 1663, 1 Lev. 107, 1 Sid. 152, cannot now be regarded as authority for the proposition that since the restraining statutes an incumbent may open a new mine (*Bartlett* v. *Phillips*, 1859, 4 De G. & J. 414, see p. 421; *Ecclesiastical Commissioners* v. *Wodehouse*, *supra*; *Holden* v. *Weekes*, 1860, 1 John. & H. 278).

If the patron, who is primarily the proper person, brings an action for an injunction to restrain the working of mines, he cannot have an account of the waste already committed for his benefit (*Knight* v. *Mosely* (undated), Amb. p. 176). It is possible that he might have it for the benefit of the living.

The Ecclesiastical Leasing Acts, 5 & 6 Vict. c. 108, ss. 6, 20, and 21 & 22 Vict. c. 57, ss. 1, 2, 10, now enable mines on glebe lands to be opened and worked in the manner there prescribed. The first of these two Acts (see s. 6) enables ecclesiastical corporations to grant or demise for a term of sixty years in possession mines, minerals, quarries, or beds, with the right of opening the same, and the lease shall reserve such rents or royalties and contain such terms as the Ecclesiastical Commissioners may approve. And no premium or term shall be taken for the lease. Each lease under the Act is to be made with the consent of the Ecclesiastical Commissioners, and in the case of a parochial incumbent the patron, and where the property is of customary or copyhold tenure, of the lord of the manor.

As to the improved value of any benefice and the amounts payable to the Ecclesiastical Commissioners under this Act and their application, see secs. 10–14. See also articles Ecclesiastical Commissioners; Leases, Ecclesiastical. Under the Ecclesiastical Leasings Act, 1858 (21 & 22 Vict. c. 87), the mines or minerals belonging to an ecclesiastical corporation may, if it shall appear to the Ecclesiastical Commissioners to be to the permanent advantage of the benefice, be leased in consideration of a premium, or sold or exchanged for an equivalent in lands or money, the terms and conditions being such as the Commissioners approve, the above-mentioned consents having been obtained; and in the case of an incumbent of a benefice, after three months' notice in writing has been given to the bishop of the diocese. Sec. 2 provides for the payment to the Ecclesiastical Commissioners of any moneys payable on any premiums on the granting of leases, or on any sales, exchanges, or partitions, and of all rents or royalties. The moneys received are to be applied in the purchase of lands, which are to be conveyed to the ecclesiastical corporation in question. Sec. 10 (*q.v.*) provides, subject to certain provisions and reservations, for the increased value of the benefice being paid to the Commissioners; but this section is not retrospective. The general effect of these Acts, therefore, is that mines on glebe land may be leased, worked, and sold; but only under the directions of the Ecclesiastical Commissioners, who may interfere by injunction to restrain any illegal workings.

The law as to opening mines on the glebe will apply equally to sinking pits for gravel, or other proceedings of a similar character.

Timber and Stone on Glebe Lands.

Timber and stone on glebe land constitute in the eyes of the law a permanent fund for the keeping the parsonage house and building in repair.

In the case of *Knight* v. *Mosely*, *supra*, Lord Hardwicke is reported to have said, but there is some doubt as to the accuracy of the report, "Parsons may fell timber or dig stone to repair, and they have been indulged in selling such timber when the money has been employed in repairs." But for Lord Hardwicke's general view as to the right of a rector to fell timber, see *Strachy* v. *Francis*, 1741, 2 Atk. 217. In any case the incumbent is only entitled to cut timber for the purpose of effecting proper and necessary repairs for his parsonage house, buildings, and premises, and he has no right to cut trees or stone for the purpose of making a general fund for repairs, and if he does so, an injunction will be granted to restrain him. If, however, the stone and timber are distant from the spot when they are required, he may sell the timber or stone, and purchase with the proceeds of the sale similar materials on the spot (*Duke of Marlborough* v. *St. John*, 1852, 5 De G. & Sm. 174; *Sowerby* v. *Fryer*, 1869, L. R. 8 Eq. 417). In *Sowerby* v. *Fryer* the incumbent, who waived his liberty to apply under the order as to the proceeds of sale of such of the timber as would be applicable for woodwork repairs actually about to be done to the parsonage, was permitted to purchase the felled timber as it lay on a valuation.

Under the Act 56 Geo. III. c. 52, an incumbent may, with the consent of the patron and the bishop of the diocese, apply moneys arising from the sale of timber cut and sold from his glebe lands for or towards equality of exchange, or for or towards the purchase price of house or lands under that Act authorised to be taken in exchange or purchased for a parsonage house or glebe lands under that Act. Timber on glebe land may, it would appear, under the Land Tax Redemption Act (42 Geo. III. c. 116), be cut down under an order of the Chancery Division for the redemption of the land tax. See sec. 20 of the Tithe Act (5 & 6 Vict. c. 54).

Fences on Glebe Lands.

The law as to buildings applies to fences (see article Ecclesiastical Dilapidations).

Miscultivation of Glebe Lands.

Miscultivation of glebe land is clearly not a dilapidation for which an incumbent who has resigned, or the executors of a deceased incumbent, are liable at the suit of his successor (*Bard* v. *Relph*, 1833, 4 Barn. & Adol. 826); but there seems no reason on principle why a course of husbandry that is damaging the reversion should not be stayed by an injunction or prohibition.

Mortgages of Glebe.

Not only is a parson unable to mortgage his benefice, including the glebe, as against his successors. His right to mortgage his own estate in it is also under restrictions.

The Act 13 Eliz. c. 20 provides "that all charging of any benefice with cure thereafter, with any pension or with any profit out of the same to be yielded and taken, thereafter to be made, other than rents to be received upon leases thereafter to be made according to the meaning of that Act,

should be utterly void." This Act was repealed by 43 Geo. III. c. 84; but 43 Geo. III. c. 84 was repealed by 57 Geo. III. c. 99, which was itself repealed by 1 & 2 Vict. c. 106, itself repealed by 37 & 38 Vict. c. 96, and this part of the Act is still in force. It was, however, not law during the interval between the Acts 43 Geo. III. c. 84, and 57 Geo. III. c. 99, and therefore a charge on glebe lands made during that period is good (*Hawkins* v. *Gathercole*, 1854, 6 De G., M. & G. 1, see pp. 20, 21): but if made at any time when the Act 13 Eliz. c. 20 was in force is void; nor under that Act can any charge be created for indirection. Therefore a warrant of attorney given by an incumbent, of which the express object is that the creditor may obtain a sequestration of the benefice, will be void under the Act; it will be valid, if the intention to affect the living does not appear on the face of it or on any collateral instrument, which is in effect incorporated in it by reference. (On this question further, see Davidson's *Conveyancing*, vol. ii. pp. 25, 26, and cases there cited; and article MORTGAGE.)

It remains to consider the mortgages which, under modern statutes, incumbents, or their ordinaries on their behalf, may legally execute in the interest of their benefices. The connection between the residence house of the incumbent and the glebe has already been explained. The Acts 17 Geo. III. c. 53; 21 Geo. III. c. 66; 1 & 2 Vict. c. 23 (Gilbert Acts): 1 & 2 Vict. c. 106 (Pluralities Act): and 28 & 29 Vict. c. 69, authorise the mortgage of the glebe for the purpose of building or repairing the residence house on the living.

The Act 17 Geo. III. c. 53, s. 1, authorises the parson, vicar, or other incumbent of any ecclesiastical living, parochial benefice, chapelry, or perpetual curacy, whereon there is no house of habitation, or such house is become so ruinous or decayed, or is so mean that one year's net income of the benefice will not suffice to build or repair the same, after laying an estimate of the work proposed to be done, verified upon oath, before the patron and ordinary, and having obtained their consent, to borrow a sum of money not exceeding two years' net income, and to mortgage the glebe tithe rents and other profits of the living to the person advancing the money. Under sec. 2 every mortgagee must execute a counterpart of the mortgage to be kept by the incumbent, and the deed must be registered in the office of the bishop or other ordinary; but under the Pluralities Act 1 & 2 Vict. c. 108, s. 26, the registration must always be in the office of the bishop of the diocese. Under sec. 4 the money shall be paid to such persons as the patron and ordinary and incumbent shall appoint, who shall contract, inspect, and pay for the buildings (s. 66 of the Pluralities Act, which generally repeats this section, substitutes the bishop for the incumbent, patron, and ordinary). See also secs. 5 and 8, which last section permits the ordinary of any living exceeding in value £100 a year, where the incumbent shall not reside in the parish twenty weeks within any year, under certain circumstances to put the Act in execution, in the way in which the incumbent is authorised to do.

An incumbent may advance his own money on mortgage under this Act (*Boyd* v. *Barker*, 1859, 5 Jur. N. S. 234), but a bishop may not (*Greenlaw* v. *King*, 1840, 3 Beav. 49; 4 Jur. 622). Money may be borrowed on mortgage under the Act for the purpose of building additional room to a residence house (*Boyd* v. *Barker*, *supra*). The Act 1 & 2 Vict. c. 23 provides (s. 1) that incumbents may borrow for the purposes of the Gilbert Acts of Geo. III., and for buying a site for a house, a sum not exceeding three years' net income of the benefice, and may mortgage the glebe, etc., for thirty-five years, to secure the money so borrowed.

The Parsonages Houses Act, 28 & 29 Vict. c. 69, s. 1, provides that the incumbent of any benefice, according to the provisions, and with the consents required in the Gilbert Acts, may, for the purposes mentioned in those Acts, or for the purposes of the Act 5 Geo. III. c. 147, or for the purpose of buying a site for a residence house, or of purchasing any lands or hereditaments not exceeding twelve acres contiguous to or desirable to be used or occupied with the parsonage house or glebe belonging to such benefice, or for the purpose of building any necessary offices, stables, outbuildings, or fences, or for the purpose of repairing the chancel, mortgage the glebe, etc., for the term of twenty-five years, for a sum not exceeding three years' net income of the value of the living, the sum so borrowed being repayable in thirty instalments.

Under the Pluralities Act (1 & 2 Vict. c. 106, s. 62), a bishop may, on the avoidance of a benefice not having a fit house of residence, raise money by a mortgage of the glebe. All mortgages made under these Acts are binding on present and future incumbents, and mortgage deeds thereunder must be made in the forms provided by the Acts.

Benefices augmented under 3 & 4 Vict. c. 113 may not be mortgaged for the purpose of purchasing, building, or improving houses of residence without the consent of the Ecclesiastical Commissioners. As to the power of incumbents to mortgage to the governors of Queen Anne's Bounty, see 34 & 35 Vict. c. 43; 35 & 36 Vict. c. 76; and article QUEEN ANNE'S BOUNTY.

SALES, PURCHASES, EXCHANGES, AND GIFTS OF GLEBE LANDS.

The joint effect of the Statutes of Mortmain and the Elizabethan restraining Acts was that no incumbent could legally sell, purchase, exchange, or take by way of benefaction, glebe land. To do any of those things was, in the opinion of the best authorities, illegal, except by private Act of Parliament (see *Turther's* case, 1598, s. 40, Eliz. Noy, 5).

In modern times this caused great inconvenience to incumbents. Glebe lands were often at a great distance from the parsonage house. The glebe was also in many instances dispersed in small parcels over common or open fields, which under leases renewable on payment of a fine made centuries ago, with the sanction of the patron and ordinary, had been let to large landowners. Those patches of glebe became in course of time indistinguishable from other lands, and great difficulties arose when the Ecclesiastical Commissioners, in whom the episcopal estates were vested, refused to renew the leases, and it became necessary to distinguish the lands. For these reasons Acts were passed to enable the glebe lands to be sold and exchanged in certain cases, and the proceeds to be employed in building or repairing parsonage houses, and for similar purposes. More recently, owing to agricultural depression, the Legislature has intervened so as to give incumbents power to dispose of the glebe for the advantage of the benefice.

The first Acts passed on the subject (1 Geo. I. st. 2, and 17 Geo. III. c. 53) (the first Gilbert Act) were of a tentative character, the first applying only to livings and augmented by Queen Anne's Bounty, while the second permits the ordinary and patron to purchase a house with two acres of land for the incumbent, and to pay the price by the sale or exchange of part of the glebe.

The Exchange of Parsonages and Glebe Land Act (55 Geo. III. c. 147) as amended by the Act 6 Geo. IV. c. 8, s. 2, gives power (s. 1) to the incumbent for the time being of any ecclesiastical benefice, perpetual curacy, or parochial

chapelry, by deed indented and registered as therein provided, with the consent of the patron and bishop of the diocese wherein the same is locally situate, to exchange the parsonage house and glebe lands for any houses and lands either within the local limits of the benefice or not, so as that the same be situate conveniently for actual residence and be of greater value or more conveniently situated than the premises given in exchange, and being of freehold tenure or copyhold tenure: provided that in the last-mentioned case no exchange be made without the consent of the lord of the manor of which the copyholds to be taken are holden. No incumbent is to be evicted from any lands taken in exchange by persons having a prior title; but the remedy of aggrieved parties shall lie against the lands given in exchange. Sec. 4 gives power to an incumbent to whose benefice, perpetual curacy, or parochial chapelry there is a manor appurtenant, with the consent of the patron and bishop, to annex copyhold lands thereof to the benefice as glebe lands. (As to s. 5 of this Act, see article RECTORY.) Sec. 6 gives power to the incumbents not possessed of glebe land exceeding five statute acres to purchase land not exceeding in the whole twenty acres, and situate conveniently for a residence, garden, glebe, etc., to be annexed to the benefice as glebe land, and land of copyhold tenure so purchased is to be held as freehold. Three months' notice is to be given before making such purchase or exchange, by three newspaper advertisements, and by a notice in writing affixed on the door of the church or chapel of the benefice (see s. 14, and 6 Geo. IV. c. 8, s. 3).

By sec. 15 maps and valuations are to be made of the premises proposed to be given and taken in exchange or purchased, and the bishop (s. 16) on the receipt of such map is to issue a commission of inquiry, which shall certify as to the propriety of the exchange or purchase before it is effected. Sec. 17 enables guardians to act for patrons in case of minority, for which similar provisions are also made in the later Acts for lunacy or coverture. By sec. 19 all deeds and instruments to be made in pursuance shall be deposited in the diocesan registry and produced for inspection when required. The Houses for Beneficed Clergy Act, 1838 (1 & 2 Vict. c. 20; and see 1 & 2 Vict. c. 29), s. 27, amending 17 Geo. III. c. 53, s. 27, empowers the incumbent, with the consent of the patron, ordinary, and archbishop of the province, to sell the parsonage house (if inconveniently situated, or for other special reasons "with any land contiguous thereto not exceeding twelve acres"). The purchase moneys (ss. 8 and 9) are to be paid to the governors of Queen Anne's Bounty, and employed in the purchase of a house or site with land contiguous not exceeding twelve acres. (As to consent of patron, see ss. 10 and 12.) Sec. 6 enables old parsonage houses to be converted into farm buildings for the tenants of the glebe.

Under 1 & 2 Vict. c. 106 a bishop may purchase a house and land for a benefice under £100 a year. (As to this statute, see *ante*, MORTGAGES ON GLEBE; see also article RECTORY.) Buildings and lands purchased under this Act are to be conveyed to the patron in trust for the incumbent.

By the Church Building Act, 1839 (2 & 3 Vict. c. 49), s. 15, the powers of sale given to incumbents by 1 & 2 Vict. c. 106 are extended so as to apply to lands and hereditaments which in consequence of a purchase, allotment, benefaction, or exchange, or otherwise, have been appropriated or annexed to a benefice, with the concurrence of the governors of Queen Anne's Bounty (see also s. 17, and articles QUEEN ANNE'S BOUNTY; RECTORY; PARSONAGE).

The Tithe Act, 1842 (5 & 6 Vict. c. 54), s. 5, provides that the Tithe Commissioners, whose powers are now exercised by the Board of Agriculture,

shall for the purpose of defining and settling the glebe lands of any benefice on the application of the landowners claiming title to such glebe or being in possession thereof, have the same powers which they have for ascertaining, drawing, and defining the boundaries of the lands of any landowners on their application; and also upon like application of any spiritual person shall have power to exchange the glebe lands or any part thereof for other lands within the same or any adjoining parish or otherwise conveniently situated, with the consent of the ordinary and patron of the benefice and the landowners claiming title to the land to be exchanged for the glebe, and in such case shall make an award as in the Act provided setting forth the contents, description, and boundary of the glebe lands as finally settled by them, and of the lands to the several parties to whom lands are awarded, and shall operate as a conveyance to the parties to whom the same is awarded, and shall be holden upon like uses and trusts as the land awarded as glebe was formerly holden on (see *Jacomb* v. *Turner*, [1892] 1 Q. B. 47). Sec. 22 of the Tithe Act, 1846 (9 & 10 Vict. c. 73), provides that the section last cited shall authorise and be deemed to have authorised the exchange of glebe lands for such other lands, although at the time no commutation of tithes was or is pending. See also Tithe Commutation Act, 1860 (23 & 24 Vict. c. 93, s. 4). (As to the statutory power of giving tithes for land, see article TITHES.)

Further facilities for the sale of glebe lands were given to the incumbents of benefices by the Glebe Lands Act, 1888 (51 & 52 Vict. c. 20). Sec. 3 of that Act authorised the Commissioners on an application made to them by the incumbent (as provided in s. 2) if they are satisfied that the prescribed notice has been given to the patron and bishop of the diocese, and that no objection has been made by either of them, or if made ought not to prevent the sale (and see subs. 2), and that the sale will be for the permanent benefit of the benefice, to approve the sale subject to the provisions of the Act, and the incumbent with such consent may sell the land; but no sale of the land occupied by the parsonage house, garden, etc., or which seems to the Commissioners necessary for the convenient enjoyment of the house, shall be approved. The purchase money (s. 4) shall be paid to the Commissioners, whose discharge shall be sufficient, and the money shall be applied in defraying the expenses incident on the sale, and the residue invested in one of the following modes, to be selected by the incumbent:—

(*a*) In purchase of certain authorised securities (see subs. 2 (*a*));

(*b*) In redemption of land tax, chief rent, or quit rent charged on the unsold part of the glebe, that the same may merge in the glebe;

(*c*) In the purchase of suitable land adjacent to the parsonage house.

Investments under this section are to be held by the Ecclesiastical Commissioners on the same trusts as the land was held on. Land purchased with money arising from a sale under the Act is to be conveyed to the incumbent and held by him as part of the glebe of his benefice.

Sec. 5 provides that where the purchase money is or is likely to be diminished by dilapidations which the incumbent is liable to make good, the same is to be recouped to the benefice by payment by the incumbent of the sum, or by the application of the purchase money towards recouping it. The Commissioners are not empowered to approve the sale of land subject to a lease created for a term exceeding twenty-one years, where by reason of the terms on which the land is let the incumbent is not in possession of the full rents and profits, or where there are mines and minerals which may

become of considerable value. Sec. 6 (subs. 1) makes provision when any glebe land sold is subject to any mortgage or debt, for the same to attach to the purchase money and any securities or land in which it is invested, and not to the land sold. Subsec. 2 provides for notice to be given to mortgagors or creditors, and enables the Commissioners to safeguard their rights. Sec. 7 makes a similar provision when any glebe land sold under the Act or any part of the endowment of the benefice to which it belongs is subject to a permanent annual charge in favour of the incumbent of any other benefice. Sec. 8 (subs. 1) provides that where such an offer is practicable without diminishing the value of the land, the Commissioners shall before giving their approval to a sale require as a condition that the land or some portion thereof be offered in sale to the sanitary authority of a sanitary district for the purpose of the Allotments Act, 1887, and (subs. 2) require notice of the proposed sale to be given to the parishioners. Subsec. 4 provides that the provisions of the Settled Land Act, 1882, apply to a sale by an incumbent under this Act. (As to consents by patrons, the Act incorporates in its schedule secs. 126, 127 of 1 & 2 Vict. c. 106; see also s. 10. As to sec. 11, which provides for leases, see article LEASES, ECCLESIASTICAL.)

Under the Pluralities Act, 1838 (1 & 2 Vict. c. 106), in the case of a union of benefices under sec. 16, sec. 17 provides that in certain cases where the income of the united benefice is larger than is sufficient for the support of the incumbent of the new benefice, glebe lands may be excepted out of the united benefice and given in exchange for lands situate in any poor benefice in the diocese, and the lands taken in exchange shall be conveyed to augment such poor benefice (see also ss. 18, 19). Sec. 23 of the same Act provides that under an Order in Council for the disunion of benefices a portion of glebe lands may, on the recommendation of the archbishop, with the sanction of the patron or patrons, be assigned to each of the dissevered benefices.

With regard to voluntary benefactions of land for glebes, sec. 4 of 2 & 3 Anne, c. 20 permits lands and goods to be given to Queen Anne's Bounty by deed enrolled or will.

Sec. 17 Geo. III. c. 33 permits ecclesiastical corporations being lords of manors, which contain any waste lands, parcel of the demesne lands of the manor convenient for the purposes of the Act, to grant them in perpetuity for such purposes.

Sec. 1 of the Act 43 Geo. III. c. 48 enables persons by deed enrolled or will to give lands not exceeding five acres in extent, and goods and chattels not exceeding £500 for providing churches and chapels where the liturgy and rites of the church are observed, with glebes. By sec. 2 no person may make more than one such gift; as to which, see *Sinnitt* v. *Herbert*, 1872, L. R. 7 Ch. 232; *Champney* v. *Davy*, 1879, 27 W. R. 390; *In re Hendry*, 1889, W. R. p. 93; see also *In re Randell*, *supra*).

By sec. 3 no glebe of upwards of fifty acres may be augmented by more than one acre. As to plots of land, see sec. 4. Under the Gifts for Churches Act, 1811 (51 Geo. III. c. 115), any person having the fee-simple of any manor may grant five acres of waste for glebe, discharged of all right of common; but this section does not enable grants to be made so as to override public and customary rights other than rights of common and manorial rights of a like nature (*Forbes* v. *Ecclesiastical Commissioners for England*, 1872, L. R. 15 Eq. 51). Under the Church Building Act, 1818 (58 Geo. III. c. 45), land not exceeding ten acres may be granted to the Church Building Commissioners for glebe (see also 55 Geo. III. c. 14; 28 & 29 Vict. c. 69).

LEASES OF GLEBE LANDS.—See article LEASES, ECCLESIASTICAL.

TITHE ON GLEBE LAND.—See article TITHES.

MISCELLANEOUS.

A rent-charge might, under the General Land Drainage Act (12 & 13 Vict. c. 1, s. 1), be made by an incumbent of glebe lands for drainage and improvements, and a sale of glebe land might be ordered to satisfy the charge (*Ex parte Rector of Kirksmeaton*, 1882, 20 Ch. D. 203; *Scottish Widows' Fund* v. *Craig*, 1882, 20 Ch. D. 208). But at present under the Improvement of Land (Ecclesiastical Benefices) Act, the Ecclesiastical Commissioners are not to sanction for the future the charging of any ecclesiastical lands for improvements without the consent of the bishop and patron. As to the land tax in respect to glebe lands, see article LAND TAX.

Under 1 & 2 Vict. c. 110, s. 13, a registered judgment operates as a charge on lands, tenements, rectories, advowsons, tithes, rents, and hereditaments (on this point further, see Dart, *Vendors and Purchasers*, 6th ed., ch. xi. s. 2).

RIGHT TO THE EMBLEMENTS OF GLEBE.

With regard to vegetable products known as emblements, it appears that at common law the executors of a deceased incumbent are entitled to emblements, but that an incumbent who resigns or is deprived is not so entitled (Williams on *Executors*, 9th ed., p. 630; *Bulwer* v. *Bulwer*, 1819, 2 Barn. & Ald. p. 470; 21 R. R. 358). The right in the case of a deceased incumbent is further established by the Act 28 Hen. VIII. c. 11, s. 4 (note—this section of the Act remains on the statute-book, though the contrary is stated), which provides that if an incumbent happens to die and before his death hath caused any of his glebe lands to be manured and sown at his proper cost and charge with any corn and grain, he may make and declare his testament of all the profits of the corn growing upon the glebe land. As to the rights of lessees of incumbents who have died or retired, see LEASES, ECCLESIASTICAL.

[*Authorities.*—Lindwood, *Prov.*; Gibs. *Cod.*; Watson, *Clergyman's Law*; Digges, *Parson's Counsellor*; Phillimore, *Eccl. Law*, 2nd ed.; Cripps, *Law of Church and Clergy*; Stubbs, *Constitutional History of England*, vol. i.; Leach, *Tithe Acts*, 6th ed.; Coote on *Mortgages*, edited by Robbins; Dart, *Vendors and Purchasers of Real Estate*; Williams on *Executors*, 9th ed.]

Goat.—Goats are not commonable animals, although a right to put them on common and waste lands may be acquired by long user (Williams, *Rights of Common*, p. 168).

By sec. 301 and schedule 13 of the Merchant Shipping Act, 1894, which deal, *inter alia*, with the number of animals that may be carried in emigrant ships, it is provided that four female goats shall be equivalent to and may, subject to the same conditions, be carried in lieu of, one head of large cattle. No male goats can be carried in such ships.

Godparent (Godfather, Godmother, Godson, Goddaughter, Godchild, Sponsor).—The office of godparent or sponsor for children at baptism dates from the early days of the primitive Church.

A constitution of St. Edmund, Archbishop of Canterbury, 1236, provides that there shall be three sponsors and no more at the baptism of a child, viz. two men and one woman at the baptism of a male, and two women and one man at the baptism of a female infant (Gibs. *Cod.* i. p. 363); and the rubric in the Prayer-Book is that there shall be for every male child to be baptized two godfathers and one godmother; and for every female, one godfather and two godmothers.

Canon 29 of the Canons of 1603 provides, "No parent shall be admitted to answer as godfather for his own child, nor any godfather or godmother shall be suffered to make any other answer or speech than by the book of common prayer is prescribed in that behalf; neither shall any person be admitted godfather or godmother to any child at christening or confirmation, before the said person so undertaking hath received the Holy Communion." The Convocation of the province of Canterbury in 1865 under royal licence framed a canon which repealed Canon 29 as to the part prohibiting parents from being godparents to their own children. This canon, however, did not receive royal sanction, nor has any such canon been passed by the Convocation of the province of York. The third rubric after the Catechism provides, "and everyone shall have a godfather or godmother as a witness of their confirmation."

A certain legal status is conceded to godparents with reference to the religious education of children in poor-law, industrial, and reformatory schools. Under the Poor Law Amendment Act, 1866 (29 & 30 Vict. c. 113, s. 14), the godparent of any child not belonging to the Established Church relieved in a workhouse or in a district school, may, in case there should be no parent, step-parent, nearest adult relative, or next-of-kin, apply to the Local Government Board for the removal of the child to a school of the religion to which the child may be proved to belong (cp. Poor Law Amendment Act, 1868, 31 & 32 Vict. c. 122, s. 23). Under the Reformatory Schools Act, 1866 (29 & 30 Vict. c. 117, s. 16), the godparent or nearest adult relative, if there is no parent, step-parent, or guardian, of any youthful offender may apply to the Court, justices, or visiting justices, as the case may be (see REFORMATORY), for the removal of the offender to a certified reformatory school of the offender's own religious persuasion; provided (1) that such application be made either before the offender has been sent to a certified reformatory school, or within thirty days of his arrival at such a school; (2) that the applicant show that the managers of the school named by him are willing to receive the offender. The like provision is made *mutatis mutandis*, in the case of industrial schools by the Industrial Schools Act, 1866 (29 & 30 Vict. c. 118, s. 20).

In *Standing* v. *Bowring*, 1885, 31 Ch. D. 282, it was held, on the evidence, that a transfer by a lady of a sum of Consols into the joint names of herself and her godson was intended to give him the beneficial interest therein after her death, and that he was therefore not a trustee for her nor bound to retransfer the Consols to her.

[*Authorities.*—Bingham, *Antiquities of the Christian Church*; Gibs. *Cod.*; Phillimore, *Eccl. Law*, 2nd ed.; Snell *Equity*.]

God's Acre.—The ancient name of a churchyard, and indicating its sacred character (as to which, see FRANKALMOIGN). The word was in use until the seventeenth century, and has now been again revived. See article CHURCHYARD.

Gold.—See generally COIN, BRITISH, FOREIGN, and COLONIAL. The BANK OF ENGLAND is required to buy all gold bullion offered in exchange for its notes, at the price of £3, 17s. 9d. per ounce of standard gold. See further, ASSAY. Gold is legal tender for any amount (Coinage Act, 1870 (33 & 34 Vict. c. 10), s. 4). As to carriage of gold, see CARRIER, vol. ii. at p. 388, and LIMITATION OF LIABILITY. As to duty on gold plate, see *Young* v. *Cook*, 1877, 47 L. J. M. C. 28, and EXCISE; see also PLATE.

Gold Coast.—A portion of the western coast of Africa, now forming a separate British colony. The Governor is assisted by an Executive Council; the Legislative Council consists of the members of the Executive Council, together with the Chief Justice and three unofficial members. The Legislature is empowered to regulate by Ordinance all such powers as Her Majesty may enjoy in the protected territories, and has used this power to put an end to slavery. The law of the colony is the common law, the doctrines of equity, and the statutes of general application in force in England on the 24th July 1874, as modified by the Ordinances passed since that date. The criminal law was codified in 1892. There is an appeal from the Supreme Court to the Queen in Council; from the Courts of the territories an appeal lies to the Supreme Court, and thence to the Queen in Council (Orders in Council of 23rd October 1877 and 29th December 1887; and see PRIVY COUNCIL). Of the native tribes the Fanti and the Ashanti are the most important.

[*Authorities.* — See the *Ordinances*, especially the Supreme Court Ordinance of 1876, and Smalman Smith, *Index to Gold Coast and Lagos Ordinances*. See also J. M. Sarbah, *Fanti Customary Law*.]

Gold Mines.—See ROYAL MINES.

Good Behaviour.—See RECOGNISANCE.

Good Cause, *i.e.* for depriving a successful plaintiff of his costs. See COSTS, vol. iii. p. 475, and Stroud, *Jud. Dict.*, *s.v.* "Good Cause."

Good Consideration.—On the meaning of this phrase in the statutes of Elizabeth for the protection of creditors (13 Eliz. c. 5) and of purchasers (27 Eliz. c. 4), see FRAUDULENT *Conveyances*; SETTLEMENTS.

Good Faith.—It may be stated generally that the words "good faith" have no technical legal signification, but are to be taken in their ordinary acceptation, and mean simply honesty in belief, purpose, or conduct. Cp. *Butcher* v. *Stead*, 1875, L. R. 7 H. L. 839; *In re Avery*, 1887, 36 Ch. D. 307; *Ex parte Watson*, 1888, 21 Q. B. D. 301; and *Tatam* v. *Haslar*, 1889, 23 Q. B. D. 345. See also Stroud, *Jud. Dict.*, *s.v.* "Good Faith."

Good Friday—The day on which is commemorated the Crucifixion of our Lord. This has since the earliest ages of the Church been observed

on the Friday immediately preceding Easter Day, and has been kept as a day of fasting and humiliation. No direction as to fasting on it is contained in the Book of Common Prayer, except the general one ordering a fast on all Fridays except Christmas Day; but proper lessons are appointed for it, with three proper collects, epistle, and gospel. It is excluded in the computation of time under the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50, s. 230); and the other provisions with regard to it in the statute-book and the R. S. C. are identical with those for CHRISTMAS DAY (*q.v.*), except that, occurring always in a close time for game, it is not expressly mentioned in 1 & 2 Will. IV. c. 32.

Good Friday is a BANK HOLIDAY: a non-BUSINESS DAY within the meaning of the Bills of Exchange Act (see also BILLS OF EXCHANGE, vol. ii. at p. 97). The Easter vacation commences on Good Friday (R. S. C., Order 63, r. 4), and the offices of the Supreme Court are closed on Good Friday (*ibid.* r. 6); and so with those of the County Courts (C. C. Rules, 1889, Order 1, r. 3). As to the relation of Good Friday to the computation of time in regard to the service of legal process, etc., see TIME. See further, the Municipal Corporations Act, 1882, s. 230; the Bankruptcy Act, 1883, s. 141 (1); the Patents Act, 1883, s. 98; and the Patent Rules, 1890, r. 7; also the Local Government Act, 1894, s. 73. Houses where intoxicating liquor is sold are closed on Good Friday as on Sunday (Licensing Act, 1874, s. 3). See as to the construction of this last provision, Paterson's *Licensing Acts*, 11th ed., by Mackenzie, p. 166.

Goods; Goods and Chattels.—See WILLS.

Goods Bargained and Sold.—This was the description applied to the old form of *indebitatus* count in a declaration for recovering the price of goods sold, but not delivered (see COUNT IN DECLARATION; ASSUMPSIT: DEBT). This count was applicable where upon a sale of goods the property had passed to the purchaser, and the contract had been completed in all respects except delivery, and the delivery was not a part of the consideration for the price, or a condition precedent to its payment (Bullen and Leake's *Precedents of Pleadings*, 3rd ed., p. 39). A claim for money payable by the defendant to the plaintiff for the price of goods bargained and sold may in similar cases be specially indorsed under the R. S. C., 1883, Order 3, r. 6, so as to entitle the plaintiff to apply for final judgment under Order 14, r. 1 (see for a form of such claim, Bullen and Leake's *Precedents of Pleadings*, 5th ed., p. 317; Allen's *Forms*, p. 64). As to when the property in the goods passes to the purchaser, see secs. 16–20 of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71). Where a writ is merely generally indorsed for the price of goods, the plaintiff may under such indorsement claim either in respect of goods sold and delivered, or of goods bargained and sold (see R. S. C., 1883, App. A. Part III. s. 2). See further, SALE OF GOODS.

Goods Sold and Delivered.—An action lies for the price of goods sold and delivered where the property in the goods has passed from the vendor to the purchaser, and the goods have been delivered, and the price is actually due and payable at the time of action brought (see SALE

OF GOODS; Bullen and Leake's *Precedents of Pleadings*, 5th ed., p. 314). As to when the property in the goods passes from the vendor to the purchaser, see secs. 16–20 of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), and SALE OF GOODS. A count for money payable by the defendant to the plaintiff for goods sold and delivered by the plaintiff to the defendant was one of the forms of common *indebitatus* counts used in a declaration prior to the passing of the Judicature Acts (see Bullen and Leake's *Precedents of Pleadings*, 3rd ed., p. 38). A claim for the price of goods sold and delivered may now be specially indorsed on a writ of summons so as to entitle the plaintiff to apply for judgment under Order 14, r. 1 (see a form of such claim, R. S. C., 1883, App. C. s. 4, No. 1). See further, SALE OF GOODS.

Goods, Wares, and Merchandises. — See GROWING CROPS; SALE OF GOODS.

Goodwill.—The chief difficulty a lawyer has to encounter in considering the law of goodwill is to find out the exact meaning of the term. There are few who do not understand what it is intended to convey, and there is seldom any difficulty in stating in any concrete case what is covered by a conveyance of the goodwill of a business. When, however, an abstract definition is attempted, the difficulty arises. It is submitted that an abstract definition is all but impossible, and that the word "goodwill" bears no more precise a signification in law than does the term "business," "concern," and many others that could be named. When the lawyer has to consider the meaning of the term, he must take into consideration the class of business being dealt with in each particular instance. If this be the right view, the definitions (or rather descriptions) to be found in various judgments are all reconcilable. In *Crutwell* v. *Lye*, 1810, 17 Ves. 335, Lord Eldon said that goodwill is nothing more than the probability that the old customers will resort to the old place; the trade, the goodwill of which was in question in that case, was the trade of a waggoner, in the habit of carrying goods from one place to another, the value of the goodwill of which depended on the probability that those in the neighbourhood desiring to have parcels carried would in future go to the spot where in the past they knew that a waggoner was in the habit of taking parcels and starting. Later, in *Churton* v. *Douglas*, 1859, 28 L. J. Ch. 841, Wood, V.C., said that Lord Eldon did not mean to confine the rights summed up in the term "goodwill" to the advantage of occupying premises to which customers were in the habit of going, and he then proceeds to give his own definition, namely, "Goodwill, I apprehend, must mean every advantage . . . that has been acquired by the old firm by carrying on its business, everything connected with the premises, and the name of the firm, and everything connected with or carrying with it the benefit of the business." The Vice-Chancellor had before him, when he made these remarks, a litigation arising out of an alleged improper competition with a Bradford wholesale stuff merchant's business. In an earlier case—*England* v. *Downes*, 1844, 6 Beav. 269—goodwill was treated as a probability that persons would return to a certain house of business in consequence of the way in which the business had been conducted in the past. In *Ginesi* v. *Cooper & Co.*, 1880, 14 Ch. D. at p. 599, Sir George Jessel treated the goodwill of a stone merchant's business as being the personal connection with buyers and sellers and the market generally; the same judge said that the goodwill of a public-house

consisted of the habit of customers resorting to the place (*Stuart* v. *Gladstone*, 1879, 10 Ch. D. at p. 658; *Ex parte Punnett*, 1880, 16 Ch. D. 226); whilst he all but denied the possibility that an East India commission merchant could have a goodwill attached to his business (*Stuart* v. *Gladstone*, *supra*). It has been doubted whether there can be any "goodwill" to the business of a professional man, but there seems no reason why its existence should be in every case denied, though in many instances its value must be small. In *Austen* v. *Boys*, 1858, 27 L. J. Ch. 714, Lord Cranworth thought the term "goodwill" wholly inapplicable to the business of a solicitor; but it is submitted that his Lordship directed his attention too closely to that variety of goodwill often spoken of as "local goodwill"; if for "goodwill" the paraphrase "connection" be used, this seems clear. In fact considerable sums are paid for the right to continue a solicitor's business, the lease of the offices, the papers in pending matters, and the introduction to clients being the outward sign of what, if not strictly goodwill, is something singularly like it. In *May* v. *Thomson*, 1882, 20 Ch. D. 705, 718, Sir George Jessel had to consider the sale of a medical practice, and said that when we talk of the sale of a non-dispensing medical practice we are really talking of the sale of the introduction to the patients, and the length, the character, and the duration of the introduction are everything.

The various statements in the cases above quoted show that the term "goodwill" varies with the class of business in connection with which it is used. It may mean the right to carry on the trade in a fixed locality, as in the case of a public-house business, or the business of a carrier plying from one fixed terminus to another (*Ex parte Punnett*, *supra*; *Crutwell* v. *Lye*, *supra*): it may be the right to represent oneself as the owner of a business which has a reputation independently of the exact place where it is carried on (*Churton* v. *Douglas*, *supra*; *Trego* v. *Hunt*, *infra*); it may be personal connection arising from knowledge of a particular market (*Ginesi* v. *Cooper*, *supra*); it may be the right of introduction to those accustomed to do business with a particular person (*May* v. *Thomson*, *supra*). Sir Nathaniel Lindley's description seems the most comprehensive, namely, "the benefit arising from connection and reputation" (*Partnership*, p. 441).

Though perhaps somewhat uncertain in its nature, goodwill is property, and as such is treated for the purpose of stamp duty in instruments dealing with it (*Inland Revenue* v. *Angus*, 1889, 23 Q. B. D. 579; *Benjamin Brooke & Co.* v. *Inland Revenue*, [1896] 2 Q. B. 356). Whether it is to be treated as real or as personal property depends upon the facts of the particular case, and especially on the nature of the property (if any) to which it is attached; see (*e.g.*) *Booth* v. *Curtis*, 1869, 17 W. R. 393. When premises to which a goodwill attaches are mortgaged, will the goodwill enure in any way to the benefit of the mortgagee? It seems that it will not if the goodwill can be severed from the premises. In *Pile* v. *Pile*, 1876, 3 Ch. D. 36, premises mortgaged were taken by a railway company, compensation being paid by the company, part for the premises and part for the goodwill, and the Court decided that the mortgagees who entered into possession were entitled to the whole; the premises in question were a ship and graving dock and premises thereon. Similar decisions are to be found where the premises in question consisted of a public-house (*Chissum* v. *Dewes*, 1829, 5 Russ. 29; *Ex parte Punnett*, 1880, 16 Ch. D. 226). On the other hand, where the personal skill of the mortgagor is the foundation of the goodwill, the goodwill does not pass under a mortgage of the premises

(*Cooper* v. *Metropolitan Board of Works*, 1883, 25 Ch. D. 472). In every case, whether the premises be conveyed by way of sale, or bequeathed or devised by will, or descend on an intestacy, the question to consider is whether the goodwill is so attached to the premises that the two are not severable; if not, they pass with the property. Whether premises pass where the goodwill alone is by name disposed of, depends on the words used in the document making the transfer. *Lee Robertson* v. *Quiddington*, 1859, 28 Beav. 529, is an authority for saying that the goodwill of a business cannot be assigned save in connection with the business.

Whatever be the nature of the business there are two rights which must invariably pass to the acquirer of the goodwill; these are (1) the right to represent himself as the person carrying on that business; and (2) the right to restrict the competition to which he may be exposed by the person from whom he has acquired the goodwill.

(1) *The Right to represent himself as the Owner of the Business.*—This involves the right to use the trade name under which the business is known (*Levy* v. *Walker*, 1879, 10 Ch. D. 436), and to restrain others from using it, or such imitations of it as may mislead the public (*Levy* v. *Walker*, *supra*; *Hookham* v. *Pottage*, 1872, L. R. 8 Ch. 91). But to this there is a limitation, namely, that the purchaser of a goodwill, though he may use the trade name, may not do so in such manner as to render the vendor liable, under the doctrine of "holding out," for the debts of the business incurred after the sale; see *Thynne* v. *Shore*, 1890, 45 Ch. D. 577, and see *post* under PARTNERSHIP; also cp. *Gray* v. *Smith*, 1889, 43 Ch. D. 208. If the vendor of the goodwill gave his name to the business, he cannot be restrained from commencing business in his own name again, unless it be shown that in so doing he is attempting to deceive the public into the belief that he is still the owner of the old business; see *Turton* v. *Turton*, 1889, 42 Ch. D. 128; *Reddaway* v. *Banham*, [1896] App. Cas. 199; and *Saxlehner* v. *Apollinaris Co.*, [1897] Ch. 893. None of these were cases in which the rights of a purchaser of a goodwill were in question: but all contain principles which it is submitted justify the statement just made; see also *Churton* v. *Douglas*, 1859, 28 L. J. Ch. 841, where the person who gave his name to a business afterwards disposed of his share in the goodwill, and started in the same class of business in his own name, with the addition of the words "& Co." (as in the original business), but was restrained by the Court; and cp. *Tussaud* v. *Tussaud*, 1890, 44 Ch. D. 678; also see *post*, TRADE NAME.

(2) *Right to restrain Competition.*—There has been considerable difference of opinion between judges as to the exact limits of this right, but the recent case of *Trego* v. *Hunt*, [1896] App. Cas. 7, has settled the law on a firm basis. In *Labouchere* v. *Dawson*, 1872, L. R. 13 Eq. 322, it was decided that the vendor of a goodwill must not, personally or by letter, or by means of agents, solicit the custom of those who were customers of the business, the goodwill of which he has parted with; this decision is declared in *Trego* v. *Hunt* (*supra*) to be good law, the dicta conflicting with this in *Pearson* v. *Pearson*, 1884, 27 Ch. D. 145, and the decision in *Vernon* v. *Hallam*, 1887, 34 Ch. D. 748, being overruled. In *Ginesi* v. *Cooper*, 1879, 14 Ch. D. 596, Sir George Jessel extended this doctrine, and decided that the vendor of the goodwill must not even deal with his former customers; this doctrine was repudiated in *Leggott* v. *Barrett*, 1879, 15 Ch. D. 306, and was declared erroneous by the Law Lords in *Trego* v. *Hunt* (*supra*). The above governs the position of a vendor of goodwill and of any person who parts with his rights in a goodwill for valuable consideration;

thus, a partner who retires by agreement, on terms which give his share in the goodwill to his copartners, is under the same limits as regards competition; such was the position of the defendant in *Trego* v. *Hunt* (*supra*). But if the alienation is involuntary, the restriction on competition and solicitation does not apply (*Walker* v. *Mottram*, 1881, 19 Ch. D. 355, a case where, the goodwill having been purchased from the trader's trustee in bankruptcy, the Court refused to restrain the bankrupt from soliciting the orders of the customers of his old business).

From the above it follows that the purchaser or acquirer for value of a goodwill cannot insist upon the retirement from the trade of the late owner of the business, and to protect himself must obtain an agreement restraining competition—an agreement which must satisfy the tests laid down in *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co.*, [1894] App. Cas. 535; and see under RESTRAINT OF TRADE.

Property in Goodwill at the Termination of a Partnership.—It is now settled that goodwill is an asset of the firm; that during the continuance of the partnership all members of the firm are entitled to share in any advantage derived from it; and that, on dissolution of the partnership, it must be sold for the benefit of all. This is the case whether the firm is put an end to by retirement or by death of a partner (Lindley on *Partnership*, 445; see Pollock on *Partnership*, 108, 111; Hall, V.C., in *Reynolds* v. *Bullock*, 47 L. J. Ch. 773). To enable this to be done to advantage, the Court will restrain any surviving partner from carrying on a business under the partnership name until the affairs of the firm have been wound up and the property has been sold, or dealt with according to the terms of the partnership articles (Lindley on *Partnership*, 447); after this has been done, the partners are entitled to trade, and even (unless the goodwill has been disposed of) to use the firm's name (James, L.J., in *Levy* v. *Walker*, 1879, 10 Ch. D. 445), subject to such limitations as may be necessary to prevent the others from being liable under the doctrine of "holding out"; see (*e.g.*) *Gray* v. *Smith*, 1889, 43 Ch. D. 208. It is not an uncommon practice to insert in articles of partnership some provision with regard to the disposal of the goodwill on the death or retirement of a partner. And where this is not done, it may be that under the clause which deals with the valuation of the outgoing member's share, some allowance to him or to his estate for goodwill may become due. Many cases may be consulted on this point; but as they all turn upon the construction to be put upon particular words, it is unnecessary to quote them here; suffice it to say that the fact that "goodwill" is not included amongst the assets in the periodical accounts of a going concern, will not *per se* disentitle a retiring member to credit for his share of its value, whatever that may be. See and cp. *Barrow* v. *Barrow*, 1873, 27 L. T. 431; and *Wade* v. *Jenkins*, 1860, 2 Gif. 509. In *Hunter* v. *Dowling*, [1895] 2 Ch. 223, the most recent case on this point, it was a provision of the partnership articles that if any partner should die during the continuance of the partnership, the amount of his share and interest should be taken at "the amount appearing as standing to his credit at the last annual balance-sheet"; a partner having died, it was decided that his representatives could not claim any allowance for his share of the goodwill, inasmuch as the value of the goodwill was not included in the last annual balance-sheet.

[*Authorities.*—All the principal authorities are cited in the text.]

Gorse.—See FURZE.

Government.—The word "government" has no technical use in English constitutional law, but is commonly used to describe collectively the ministers of the Crown. Thus we talk of Lord Salisbury's Government or Administration. See CABINET; EXECUTIVE GOVERNMENT; MINISTRY.

De Facto and *De Jure.*—See DE FACTO; DE JURE.

Securities; Stocks.—See FUNDS; NATIONAL DEBT.

Stores.—See PUBLIC STORES.

Governor.—The expression "governor" in every Act passed after the commencement of the Interpretation Act, 1889, 52 & 53 Vict. c. 63,—viz. on 1st January 1890, see sec. 42 of the statute,—unless a contrary intention appears, means, as respects CANADA and India (see BRITISH INDIA), the governor-general, and includes any person for the time being having the powers of the governor-general; and as respects any other BRITISH POSSESSION, includes the officer for the time being administering the government of that possession (Act of 1889, s. 18 (6)). As to powers of colonial governors, see article COLONY, vol. iii. at p. 112; see also EXCELLENCY.

Grain Cargo.—Special provisions are made by the Merchant Shipping Act, 1894, for the carriage of gain cargoes in British ships. "Grain" in the Act means any corn, rice, paddy, pulse, seeds, nuts, or nut kernels; and a "ship laden with a grain cargo" means a ship carrying a cargo of which the grain portion is more than one-third of her registered tonnage (s. 456). Proper precautions must be taken to prevent grain cargo from shifting, or the master of the ship, and any agent of the shipowner who is charged with the loading of the ship or the sending of her to sea, and the owner of the ship unless he took all reasonable means to enforce such precautions, and was not privy to the breach thereof, may be liable to a penalty of £300 (s. 452). Where a British ship laden with a grain cargo in the Mediterranean or Black Sea is bound for ports outside the Straits of Gibraltar, or is laden with a grain cargo on the coast of North America, certain precautions enumerated in the eighteenth schedule to the Act to guard against shifting must be followed, unless the ship is loaded in accordance with regulations approved by the Board of Trade, or is built and loaded in accordance with any plan approved by the Board of Trade. Non-compliance with this provision is a breach of the preceding section, and subject to its penalties; and compliance with it does not exempt any person from any liability, civil or criminal, for failure to adopt any precautions which are reasonably required to prevent grain from shifting, though not mentioned in the schedule (s. 453).

Before such a ship as those above specified leaves her final port of loading, or within forty-eight hours of that time, the master must deliver to the British consular officer or chief officer of Customs there, as the case may be, a notice stating the draught of water and clear side (see LOADLINE) of the ship after loading her cargo, and the kind of grain and quantity thereof, the mode in which it is stowed, and the precautions taken against shifting; and he must also deliver a similar notice to the proper officer of Customs in the United Kingdom, together with the report required by the

Customs Consolidation Act, 1876, on the arrival of the ship in the United Kingdom, and every such notice shall be sent to the Board of Trade as soon as practicable. The penalty for failure to deliver such a notice, or for wilfully making a false statement, or wilfully omitting a material particular therein, may be £100. The Board may, by notice in the *London Gazette* or otherwise, exempt ships or any class of ships laden at a particular port from this liability (s. 454). In order to enforce these provisions, Board of Trade officers may inspect any grain cargo, and have all the powers of a Board of Trade inspector (s. 455).

Grain Poisoned.—See Poison.

Grammar School may be shortly defined as an endowed school for instruction in Greek or Latin. Such in effect is the purport of the definition in the Grammar Schools Act, 1840 (3 & 4 Vict. c. 7), s. 25. With regard to the history of grammar schools it may be observed that many which are associated with the name of Edward VI. were in reality refoundations by that monarch of mediæval schools. (See A. F. Leach, *English Endowed Schools at the Reformation*, 1897.) It was formerly held by the Courts of equity that there was no power in the case of a Free Grammar School to provide for instruction in subjects other than Greek and Latin (*A.-G.* v. *Whiteley*, 1805, 11 Ves. 241, per Eldon, C.), but this rule was subsequently relaxed (Tudor, *Charitable Trusts*, p. 163). Under the Grammar Schools Act, 1840 (3 & 4 Vict. c. 7), from which certain named schools are expressly exempted, Courts of equity have the power of extending the system of education in grammar schools to "other useful branches of literature and science in addition to or (subject to certain provisions thereinafter contained) in lieu of the Greek or Latin languages, or such other instruction as may be required by the terms of the foundation or the then existing statutes" (s. 1). But the whole of the old law as to grammar schools has been practically superseded and rendered obsolete by the Endowed Schools Acts, 1869 to 1874, inasmuch as by the Endowed Schools Act, 1874 (37 & 38 Vict. c. 87), s. 6, the Court can only exercise jurisdiction in such cases with the consent of the Committee of Council on Education, and there appears to be no instance of such consent having been obtained.

For a summary of the old law, see Tudor, *Charitable Trusts*, 3rd ed., pp. 162–169; and as to the present law, see article Endowed Schools, *ante*. It may be noticed that under the Endowed Schools Act, 1869 (32 & 33 Vict. c. 56), s. 8, subs. 3, and the E. S. Act, 1873 (36 & 37 Vict. c. 87), s. 3, elementary schools which are grammar schools within the meaning of the Grammar Schools Act, that is to say, grammar schools by foundation, or departments of such schools, are expressly reserved to the jurisdiction created by the Endowed Schools Acts. See also article Free School.

Granaries are specially named in the provisions of the Malicious Damage Act, 1861 (24 & 25 Vict. c. 97), as to arson (s. 3) and as to riotous demolition or damage (ss. 11, 12), and also in 11 Geo. II. c. 22; 36 Geo. III. c. 9. But these two Acts have now only a very limited application to England (9 Geo. IV. c. 31, s. 1), and are virtually superseded by sec. 39 of the Offences against the Person Act, 1861 (24 & 25 Vict. c. 100).

Grand Assize.—A body of twelve recognitors, elected by four knights, chosen by the sheriff for that purpose. The Grand Assize was a mode of determining a real action (see ACTIONS), alternative to wager of battle (see BATTLE, WAGER OF). It was in the option of the tenant to put himself on the assize. If he did so, he obtained a writ of *peace* to the sheriff, staying the proceedings in the Court of the Lord or the County Court, and the assize returned its verdict to the King's Court at Westminster, or in eyre. The question put to the recognitors was in this form, "Who has the greater right to the land—the tenant or the demandant?"

Grand Jury.—See JURY.

Grand Larceny.—See LARCENY.

Grand Serjeanty.—See TENURES.

Grant.—The word in its widest sense comprehends any passing of property from one person or set of persons to another, and may be by word only, or by writing or deed. In its stricter sense, however, it is the conveyance of such property as is technically said to "lie in grant." A grant, then, in this sense is one of the old common law conveyances. It is made by deed, and the operative words in it are *do* or *dedi*, or *dedi et concessi*. A grant is valid and effectual without livery of seisin—this being the great and main distinction between a grant and a feoffment (see FEOFFMENT). Accordingly a grant was the conveyance used by the common law for effectuating all transfers of estates not in possession, and of which, therefore, there could be no livery of seisin. Accordingly all estates in expectancy were conveyed by grant; so also were hereditaments purely incorporeal, as *e.g.*, rents, advowsons in gross, and the like, for the same reason, viz. that there could be no livery of them. This species of property was said to *lie in grant*, as contrasted with property of which actual seisin could be delivered, and which was said to *lie in livery*. The Real Property Act, 1845 (8 & 9 Vict. c. 106), by enacting (s. 2) that after 1st October 1845 all corporeal tenements and hereditaments should, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery, made the conveyance by grant applicable to all classes of hereditaments alike, and thereby greatly increased its use. After the passing of the Act conveyancers made a point of using the word "grant" as the operative word in the conveyance. This was rendered unnecessary by the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), which declared (s. 49) that the use of the word "grant" should not be necessary in order to convey tenements or hereditaments, corporeal or incorporeal; and this section applies to conveyances made before or after the commencement of the Act.

As to grants of estates in expectancy, it may be here remarked that to perfect the grant of a reversion or remainder, the tenant of the particular estate had formerly to attorn to the grantee. This attornment was rendered unnecessary by 4 & 5 Anne, c. 3.

Construction of a Grant.—It is an old rule of law that a grant will always be construed more strongly in favour of the grantee; the exception

is where the grantor is the Crown, in which case the grant will be construed against the grantee. The various cases on this rule are collected in Elphinstone on *Interpretation of Deeds*, cap. vii. A grant will be presumed, even from the Crown, where there has been undisturbed possession for some long time (*Jeffreys* v. *Machu*, 1860, 29 Beav. 344; see also *Pickett* v. *Packham*, 1868, L. R. 4 Ch. 190).

A deed which may fail to operate in its original form is by the Courts often made to take effect as a grant at common law consistently with the original intention of the parties to the deed; and conversely an intended grant, ineffectual as a deed of grant, is made to take effect as a covenant to stand seised, *e.g. Doe d. Lewis Lewis* v. *Rees Davies*, 1837, 2 Mee. & W. 503; see also note at p. 512. As to the doctrine of the implied warranty of title raised by the use of the word "grant" in a conveyance: if such a warranty were raised at all it was a personal warranty only and did not affect the grantor's heir. The learning on the subject is dealt with exhaustively in the note to *Co. Litt.* 384 *a*, by Hargrave and Butler. Any such implied warranty, if any, was abolished by the Real Property Act, 1845, which provides (8 & 9 Vict. c. 106, s. 4) that the word "give" or the word "grant" in a deed executed after the 1st October 1845 shall not imply any covenant in law in respect of any tenements or hereditaments except so far as the word "give" or "grant" may by force of any Act of Parliament imply a covenant.

The Acts of Parliament referred to in the latter part of the section are probably: 6 Anne, c. 62 (s. 30); 8 Geo. II. c. 6 (s. 35); 8 & 9 Vict. c. 18 (s. 132). By force of the first two of these enactments the words GRANT, BARGAIN AND SALE in deeds affecting lands situate in the East and North Ridings of Yorkshire were equivalent to express covenants for title. These Acts are, however, repealed by the Yorkshire Registries Act, 1884 (47 & 48 Vict. c. 54).

By virtue of sec. 132 of 8 & 9 Vict. c. 18 (the Lands Clauses Consolidation Act, 1845), in every conveyance of lands to be made by the promoters of an undertaking under the Act, the word "grant" shall, except so far as restrained or limited by express words contained in any such conveyance, operate as express covenants by the promoters of the undertaking, and their successors, or their heirs, executors, administrators, and assigns, as the case may be, with the grantees and their successors, heirs, executors, and assigns, to the effect set out in the section. The covenants are the usual ones for (1) right to convey; (2) quiet enjoyment; (3) freedom from incumbrances; and (4) further assurance. It will be noticed, too, that the covenants are not personal like those formerly implied by law.

Grant, Lost.—The existence of certain rights as easements is supported in law by presumption of a lost grant, or agreement, or an implied covenant, where the right asserted is proved to have been long enjoyed, and the person against whom it is claimed might have interrupted or prevented the exercise of the right with respect to which it is presumed (*Chastey* v. *Ackland*, [1895] 2 Ch. 389, at 397). Resort to this presumption is had in cases in which immemorial user or common law prescription cannot be proved, and in which no statutory prescription by user for a specified period has been applied. The presumption can only apply in a case in which the grant could have a legal origin (*Dalton* v. *Angus*, 1881, 6 App. Cas. 740; *Goodman* v. *Saltash* (*Mayor*), 1882, 7 App. Cas. 633; *Halliday* v. *Phillips*, [1891] App. Cas. 228; *Tilbury* v. *Silva*, 1890, 45 Ch.

D. 92; *Haigh* v. *West*, [1893] 2 Q. B. 19; *Simpson* v. *Godmanchester Corporation*, [1897] App. Cas. 696; and see PRESCRIPTION).

Gravel; Gravel-Pits.—Gravel is not to be taken from any Crown forests, woods, or woodlands by any surveyor of highways or other persons without the consent in writing first obtained of the Commissioners of Woods and Forests (Crown Lands Act, 1829, 10 Geo. IV. c. 50, s. 106); and is not to be taken compulsorily for land hired as ALLOTMENTS by Parish Councils (Local Government Act, 1894, 56 & 57 Vict. c. 73, s. 10 (9)). The Sale of Exhausted Parish Lands Act, 1876, 39 & 40 Vict. c. 62, provides for the sale of exhausted gravel-pits allotted for the repair of highways (s. 1), and see HIGHWAYS.

Gravestone.—See TOMBSTONE.

Gray's Inn.—See INNS OF COURT.

Grazing.—1. The right to take the herbage *in alieno solo* by the mouths of the tenant's cattle is an ordinary incident of copyhold tenure. It arises (1) as to lammas lands which are held in common during part of the year; (2) as to the wastes of the manor. It is sometimes called beast-gait or cattle-gait, *i.e.* the right for cattle to go on land of others.

2. The right of grazing at the side of highways or on roadside wastes is presumed to belong to the adjoining owners *usque ad medium filum viæ*, in whom the herbage is vested. This right is not destroyed by the Local Government Acts, 1888 and 1894 (*Curtis* v. *Kesteven County Council*, 1890, 45 Ch. D. 504), which merely enable the local authorities to prevent encroachments. The presumption may be ousted by the terms of Inclosure Acts setting out the road, or by evidence of the exercise of the right by other persons (*Haigh* v. *West*, [1893] 2 Q. B. 19).

Where a highway has become a street, the urban district council is said to have authority to let the grazing right (*Coverdale* v. *Charlton*, 1879, 4 Q. B. D. 104). But the authority of this case is somewhat impaired by *Tunbridge Wells* (*Mayor*) v. *Baird*, [1896] App. Cas. 434. The adjoining owner is entitled to impound animals which he finds feeding on his side of the road (Glen, *Highways*, 2nd ed., 614), but must exercise his grazing rights so as not to interfere with the public use of the highway, and if he lets his cattle stray is subject to sec. 25 of the Highway Act, 1864 (27 & 28 Vict. c. 101; *Golding* v. *Stocking*, 1869, L. R. 4 Q. B. 516).

[*Authorities.*—Pratt on *Highways*, 14th ed., 42–45, 354; Glen on *Highways*, 2nd ed., 46, 58, 343; Hunter on *Open Spaces*, 1896, 301–317.]

Great Seal.—From very early times in our national history grants by the sovereign of lands, honours, franchises and the like have been authenticated by the affixing to them of a seal, called to distinguish it from certain other seals, the Great Seal. This seal is always under the control and in the custody of the Lord Chancellor for the time being, except on the rare occasions when it has been intrusted to a Lord Keeper, or put in commission, that is, delivered to several persons, usually three, who are

collectively responsible for its use. The last Lord Keeper was Sir Robert Henley (afterwards Lord Chancellor Northington) in the reign of George II., and the last instance of Commissioners of the Great Seal being appointed occurred in 1850, when Lord Langdale, then Master of the Rolls, Vice-Chancellor Shadwell, and Baron Rolfe were sworn in as such Commissioners, the seal itself being delivered to Lord Langdale as First Commissioner. Delivery of the seal by the sovereign to the Lord Chancellor confers upon him all the powers of his office in the same way as delivery of the secretarial seals invests the Secretaries of State with their powers.

By article 24 of the Act of Union between England and Scotland it was enacted that there should be one Great Seal for the United Kingdom, and by sec. 9 of the Act of Security and Succession (6 Anne, c. 41) it was provided that the Great Seal in existence at the time of the demise of the sovereign should be used as the seal of his or her successor until such successor should otherwise direct. A new seal is, however, made for each sovereign, and sometimes there are several in the course of a long reign. When a new one is made, it is first laid on the table at a meeting of the Privy Council, and when approved is touched by the sovereign and intrusted to the Lord Chancellor; at the same time the former seal is defaced and returned to the Chancellor (Wyon, *The Great Seals of England*, Introd. p. xv.).

By the Great Seal Act, 1884, a warrant under Her Majesty's Royal sign-manual, countersigned by the Lord Chancellor, or one of the principal Secretaries of State, or two of the Commissioners of the Treasury, is necessary for passing any instrument under the Great Seal, unless where before the Act the *fiat* of the Lord Chancellor or other authority was sufficient. Such authorisation may thus be given by a *fiat* of the Lord Chancellor, or by the Speaker's warrant (for the issue of writs for elections to vacant seats in the House of Commons), or by an Order in Council, or by a sign-manual warrant properly countersigned (Anson, *Law and Custom of the Constitution*, Part II., "The Crown," pp. 51 *et seq.*).

Prior to the Crown Office Act, 1877, the Great Seal was required to be affixed to a great number of documents, but that statute empowered a committee of the Privy Council to direct the use of wafer seals, bearing the same device as the Great Seal, for the authentication of various classes of instruments; such wafer seal to be kept in the same custody and to have the same effect as the Great Seal. Under the powers thus conferred, rules were issued in 1878 prescribing *inter alia* that royal proclamations, royal assent commissions, writs of summons to peers to attend Parliament, writs of attendance addressed to judges, the Attorney-General and Solicitor-General, writs for election of members of Parliament, commissions to open and prorogue Parliament, and various letters patent should have the wafer great seal attached, but that if in any case it should be found more convenient to pass any of the particularised documents under the Great Seal itself, the Lord Chancellor might give directions accordingly (*London Gazette*, 5th March and 13th August 1878).

Thus since the statute of 1877 the use of the Great Seal has been much more restricted; it is still, however, used on various instruments, *e.g.* in letters patent creating peers and appointing judges of the High Court.

Letters patent for inventions which formerly were passed under the Great Seal are now sealed with the Patent Office seal, which is declared to have the same effect as if the Great Seal were affixed (Patents Act, 1883, s. 12). See Edmunds, *Patents*, 2nd ed., pp. 1, 2.

Forging or counterfeiting the Great Seal is felony punishable with imprisonment or penal servitude (Forgery Act, 1861, s. 1).

Greenhouse.—See GLASS-HOUSES; LONDON (COUNTY) *Buildings*; TOWN GOVERNMENT.

Green Silver—A customary yearly payment of ½d. made by tenants of the manor of Writtle in Essex, whose front door opened on Greenbury (Cowel and Jacob, *s.v.*). Writtle was at one time a forest and ancient Crown demesne (see Fisher, *Forest of Essex*, 1887, pp. 3, 15, 17, 24, 343). The payment suggests the existence of some grant either of a village green or of some right of vert in the old forest (see Hunter on *Open Spaces*, 1896, pp. 175–187, 203; *Forbes* v. *Ecclesiastical Commissioners*, 1872, L. R. 15 Eq. 51).

Greenwich Hospital was founded in 1694 for the relief of disabled seamen of the royal navy. The idea seems to have originated with James II. See 1 Jac. II. c. 18, which transferred the proceeds of a duty on foreign built ships to the Trinity House for relief of decayed seamen.

Property and Management.—It was endowed by William and Mary with land, part of the manor of East Greenwich. In 1700 (12 & 13 Will. III. c. 13, s. 6) William III. was empowered to make additional grants out of the manor of East Greenwich. In 1705 (4 & 5 Anne, c. 23, s. 14) the proceeds of the estate of William Kidd, the pirate, were devoted to the same cause, and in 1710 (9 Anne, c. 17, s. 2, and c. 27) provision was made for applying part of the London coal duties and of other duties in support of the hospital and for the management of the hospital and to regulate eligibility of pensioners. In 1735 (8 Geo. II. c. 29) and 1738 (11 Geo. II. c. 30) grants were made to the hospital of the proceeds of the estate of the attainted Earl of Derwentwater. In 1748 (22 Geo. II. c. 52) these parts of the Derwentwater estates there specified were vested for an estate of fee-simple absolute in trustees on trust for the hospital. By sec. 2 of the Act the manor of Alston Moor in Cumberland was also transferred from the Crown to the Commissioners, which explains the continued existence of this Court under the Admiralty. See INFERIOR COURTS.

An Act of 1752 (25 Geo. II. c. 42) gave the Commissioners further powers as to purchase of land, etc., for completing the hospital.

The powers of management, lease, and sale were supplemented in 1777 (18 Geo. III. c. 29) as to exchange of certain lands and as to the grant of mineral leases. Mineral leases are further regulated by 8 & 9 Vict. c. 22, s. 37.

In 1775, December 6, letters patent were issued incorporating the Commissioners of the hospital, and in 1776 (16 Geo. III. c. 24) the properties vested in trust for the hospital were transferred to the new corporation.

The Acts of 1820 (1 Geo. IV. c. 106) and 1829 (10 Geo. IV. c. 25, ss. 35, 36) regulate the exercise of the ecclesiastical patronage incident to the property thus vested, and vest it in the Admiralty. The benefices specified had been in 1811 (51 Geo. III. c. cxiv.) reserved for navy chaplains. The Act of 1820 permits them on presentation to keep their half-pay.

In 1829 (10 Geo. IV. cc. 25, 26) the Act of 1776 was repealed, and a new statutory scheme made, whereby the affairs of the hospital proper were vested in Commissioners, but the receipt, payment, and management of naval prize and pension was transferred to the Admiralty (see PRIZE), who were also given a general control over the hospital and the appointments of all officers (except the governor, lieutenant-governor, and commander) (see St. R. & O., Rev., vol. iv. p. 114). The Commissioners were in 1845 (8 & 9

Vict. c. 22), 1849 (12 & 13 Vict. c. 28), and 1850 (13 & 14 Vict. c. 24) given additional powers as to the management of the hospital estates and of Greenwich market vested in them under a title derived from William III. in 1700 and there set out.

The Acts hitherto mentioned, though passed as public and general, are not printed in the revised statutes, being treated as of a local and personal or private character.

In 1865 (28 & 29 Vict. c. 89) the Act of 1829, except as to ecclesiastical patronage, was repealed, and the government of the hospital is now regulated by the Greenwich Hospital Acts, 1865 to 1894 (see Short Titles Act, 1896), which are treated and printed as public Acts. The government and property of the hospital vests in the exclusive control of the Admiralty (1865, ss. 22–46; 1883, c. 32, s. 8), which appoints, pays, and regulates the staff (ss. 11–19; 1869, c. 44, s. 15), manages the hospital schools, and determines the amounts and conditions of grant of hospital pensions or out-pensions (1865, s. 20; 35 & 36 Vict. c. 67, s. 8). As to hospital stores, see PUBLIC STORES.

The actual management is intrusted to a lord commissioner or secretary of the Admiralty as directed by Admiralty minutes (1885, c. 42, s. 6). The expenditure under the Acts is now defrayed in the first instance out of the separate hospital account kept under the Act of 1869 (c. 44, s. 8), and any deficiency is made up by the Paymaster-General (1885, c. 42, s. 2). Annual accounts and estimates are laid before Parliament by the Admiralty (1865, c. 89, ss. 47, 49; 1881, c. 42, s. 4; 1885, c. 42, ss. 3, 4), and the accounts are subject to audit by the Auditor-General (1868, c. 39, s. 46). Besides the revenues of its landed and other property, the hospital receives one-fourth of all freights for treasure conveyed in Queen's ships (Order in Council, 10th August 1888: St. R. & O., Rev., vol. iv. p. 80).

Under the powers of management, etc., the Admiralty have applied much of the buildings of the hospital for purposes of the navy, quite independent of its original design (1869, c. 44, s. 7).

Pensions, etc.—A. The benefits granted from the hospital funds fall into the following classes:—

(*a*) Permanent or temporary admission to the benefits of the hospital of non-commissioned officers or men of the royal navy or marines not in receipt of naval pensions but discharged as invalided from disease or wounds contracted or received in the service of the Crown, or infirm or helpless. The benefits may be received either at Greenwich Hospital or at a naval hospital or infirmary (1869, c. 44, ss. 3, 4).

(*b*) Permanent admission on the establishment, and to the benefits of the hospital as inmates, of persons entitled to naval pensions while they are inmates; the naval pensions are not paid to them but to the hospital account (1869, c. 44, s. 11). Maintenance outside the hospital may be substituted for this (1869, c. 44, s. 5).

(*c*) Greenwich Hospital out-pensions to persons entitled to the benefits of the hospital (1865, c. 89, s. 5; 1869, c. 44, ss. 5, 11).

(*d*) Greenwich Hospital out-pensions, now called naval pensions (1865, c. 73; c. 89, s. 7; see Admiralty Regs., arts. 2126, 2127).

(*e*) Life annuities for masters and seamen of the mercantile marine who have contributed 6d. per mensem out of wages to support the hospital (1872, c. 67, ss. 2, 3).

(*f*) Education and maintenance of sons or daughters of deceased or incapacitated warrant officers, non-commissioned officers, petty officers, and men, and of sons or daughters of deceased or distressed commissioned officers,

and of the men of naval volunteers killed or drowned in service of the Crown (1872, c. 67, ss. 4, 5, 6, 7; 1883, c. 32, ss. 3, 4). The maximum is prescribed by Order in Council made in 1885 (under 1885, c. 42, s. 5).

(*g*) Pensions to widows and allowances to children of non-commissioned officers and men of the royal navy or marines killed or drowned in the service of the Crown or on life-boat service, or men of the royal naval volunteers or artillery volunteers, or in the seamen pensioners reserve killed or drowned in the service of the Crown (1883, c. 32, s. 2).

Assignments of the pensions above named are void (1865, c. 73, s. 4, and c. 89, s. 8).

A large power of legislation and regulation by Orders in Council is given by these Acts. The orders are published in the official edition of the Admiralty Regulations and Instructions (see ed. 1893, arts. 2097–2225), and the Admiralty Orders in Council, 5 vols.

The provisions of the Acts of 1865 (cc. 73, 111, 124) as to marine pay and pensions, property of deceased seamen and marines, and Admiralty powers, were applied in 1884 (c. 44, s. 2) both to naval pensions and to Greenwich Hospital pensions, gratuities, and allowances. Orders in Council under the latter Acts have been made which are published in St. R. & O., Rev., vol. iv. pp. 93–126.

B. The corporation of naval knights of Windsor was dissolved in 1892, and its property transferred to the Admiralty for administration, but not for merger with the property and revenues of Greenwich Hospital. It is applied in granting pensions to retired officers of the rank of lieutenant in the navy or officers retired from the active list or lieutenants with the rank of commander (55 & 56 Vict. c. 34).

Greenwich Mean Time.—Whenever any expression of time occurs in any Act of Parliament, deed, or other legal instrument, the time referred to, unless it is otherwise specifically stated, is to be held in the case of Great Britain to be Greenwich mean time (43 & 44 Vict. c. 9, s. 1). This provision seems to apply to statutes and documents passed or made either before or after August 2, 1880. Where time is defined by reference to sunset or sunrise (8 & 9 Geo. IV. c. 69, s. 12), and not by the clock (14 & 15 Vict. c. 19, s. 11), the Act would seem to be inapplicable, and the mean time of the particular place would seem to be the proper mode of calculation (see *Curtis* v. *March*, 1859, 3 H. & N. 868).

Green Yard—A place for the reception, deposit, and safe custody (1) of articles seized by a local authority in London under any local Act, (2) of animals or goods found in streets or public places which may be impounded at common law or under any general or local Act. The vestries and district boards of London are empowered (57 Geo. III. c. xxix.) to purchase or rent a green yard, and to appoint and pay a superintendent, and to appoint fees and charges to be paid for the deposit and safe custody of seized articles or impounded animals or things, which must be paid before the articles, etc., are released, or may be deducted out of the proceeds of their sale where that is authorised by statute.

Greffier (Fr.)—A word occurring in reports of cases involving French law: the clerk of the Court, whose duties under French judicial

organisation are to transcribe, keep, and deliver office copies of judicial decisions. He also fulfils the duties of public auctioneer in districts where there are none.

Gretna Green.—See MARRIAGE.

Grievous Bodily Hurt.—See BODILY HARM; and OFFENCES AGAINST THE PERSON.

Grievous Harm.—See BODILY HARM.

Grocer.—See EXCISE; LICENSING.

Groom of the Stole.—This office was discontinued on the accession of the present sovereign, and is only in use during the reign of a king, when it is in the department of the Lord Chamberlain, and its holder comes next to the Vice-Chamberlain in rank and authority. During the reign of a queen regnant or consort, the Mistress of the Robes performs the duties analogous to those of the Groom of the Stole, who is First Lord of the Bedchamber in the reign of a king. His title and official distinction arise from his having the custody of the long robe or vestment called the stole, worn by the king on occasions of state.

It is not a political office which changes with a change of Government; but it is a charge on the civil list. See LIST (CIVIL).

Gross.—As to the meaning of this term in the phrases "gross value," "gross estimated rental," see the leading cases of *Dobbs* v. *Grand Junction Waterworks Co.*, 1883, 9 App. Cas. 49; *R.* v. *School Board for London*, 1886, 17 Q. B. D. 738; sec. 15 of the Union Assessment Committee Act, 1869, 32 & 33 Vict. c. 69. As to the use of the term in connection with ADVOWSON and COMMON, see those headings. As to "gross negligence," see NEGLIGENCE. See further, ANNUAL VALUE, and Stroud, *Jud. Dict. s.v.* "Gross."

Groundage is defined as the consideration paid for standing a ship in a port; or, in other words, it is the right to take a toll from a ship which intentionally grounds in a tidal harbour. "The right of groundage, anchorage, and wreck of the sea, or either of them, is some evidence that the soil between high and low water marks was meant to pass (by a deed giving such rights): if you let groundage in any way in which the ground is required for purposes of navigation, in particular if it is a district where the tide goes out and the vessel lies between high and low water marks, there would be the use of the soil for the ship that is to ground, and the person who is to have payment for groundage is presumed to have the right to the soil" (Erle, C.J., *Lestrange* v. *Rowe*, 1866, 4 F. & F. 1048). Groundage and anchorage are port dues and not soil dues, and belong to the person owning the port, and not necessarily to the person who owns the

soil of the port; but they may be evidence in support of a claim to the soil of an inlet or harbour both above and below low water mark (*A.-G.* v. *Burridge*, 1822, 10 Price, 358; 24 R. R. 705; *A.-G.* v. *Portsmouth*, Moore, *Foreshore*, 555–559).

Ground Game.—There is no clear legal definition of the word "game," which is stated by Erle, C.J. (*Jeffryes* v. *Evans*, 1865, 34 L. J. C. P. 261), to be an indefinite word, which seems to have had various meanings at different times. In modern times the different statutes dealing with sporting rights give a definition of game for their several purposes. The Ground Game Act of 1880 (43 & 44 Vict. c. 47) in its interpretation clause, s. 38, defines ground game as hares and rabbits, in which sense the word is used in the present article. Although, however, rabbits and hares form one class for the purpose of this Act, the law for other purposes distinguishes between them. Apart from the Ground Game Act, there is a considerable doubt whether rabbits (otherwise conies) can be properly described as game. In *R.* v. *Yates*, 1 Raym. (Ld.) 151 (8 & 9 Will. III.), the Court was of opinion that rabbits in a private warren were not game. Rabbits in a warren, however, appear to have been entitled to protection, and generally the law has, to a certain extent, safeguarded rabbits, on the ground that they are not only subjects of diversion, but constitute an article of food. Rabbits are not deemed to be game within the meaning of the Game Act, 1831 (1 & 2 Will. IV. c. 32), and therefore where the right to game only is reserved to the landlord, the tenant may yet kill rabbits (*Spicer* v. *Barnard*, 1859, 28 L. J. M. C. 176). And he may employ his servant or a professional rat-catcher to kill them, but he may not give leave to a stranger to do so, either for his own or for that stranger's use; for under the Game Act, sec. 30, any person charged with trespassing in pursuit of game or conies in the daytime upon land on which the right to the game does not belong to the occupier cannot set up his leave or licence as a defence (*Pryce* v. *Davies*, 1871, 35 J. P. 377). In cases in which the landlord, however, reserves to himself the exclusive right of hunting, shooting, fishing, and sporting, the tenant has, apart from the Ground Game Act, no right to kill rabbits (*Jeffryes* v. *Evans*, *supra*).

There is no close time for rabbits, and they may always be killed in the daytime by the person properly entitled to do so, but they may not be shot at night by any person (see Ground Game Act, s. 6; see also the Night Poaching Acts, 9 Geo. IV. c. 69 and 7 & 8 Vict. c. 28, both of which protect rabbits; see also article GAME LAWS).

An excise licence to kill game is required for the killing of rabbits under the Game Licence Act, 1860, 23 & 24 Vict. c. 90, except in the case of the occupier of land (see s. 5; see also Ground Game Act, s. 4) or the proprietor of any warren or enclosed ground.

To take rabbits (or hares) from a warren either by day or night is a misdemeanour under the Larceny Act, 1861, 24 & 25 Vict. c. 96, s. 16. As to warrens, see article WARREN.

Hares are game for the purposes of the Game Act, 1831, and a licence to kill them is required under the Game Licence Act, 1860; but under the Hares Act, 1848, 11 & 12 Vict. c. 29, persons in occupation of enclosed ground and owners who have the right of killing game on their lands may exercise the right without taking out such licence either by themselves or by any person authorised by them; but the authority to kill hares must under sec. 2 be limited to one person at the same time in

any one parish, and must be registered by the clerk to the petty sessions of the district. Under sec. 4 no licence is required for coursing or hunting hares. Poison may not be laid for hares, and they may not be shot at night (Game Act, 1831, s. 3; Hares Act, 1848, s. 5; Ground Game Act, 1880, s. 6). Hares may not be killed or taken on a Christmas Day or Sunday (Game Act, 1831, s. 3, which provides a penalty).

The effect of the Ground Game Act having caused a great decrease in the number of hares, an Act (the Hares Preservation Act, 1892, 55 & 56 Vict. c. 8) was passed forbidding the selling or exposing for sale in Great Britain of any hare or leveret during the months of March, April, May, June, or July, under a penalty of 20s.; but this Act does not apply to foreign (which probably includes Irish) hares imported into Great Britain.

It remains to consider the Ground Game Act, 1880, 43 & 44 Vict. c. 47.

This Act, which was passed to enable occupiers of land to protect their crops from injury and loss from ground game (which here, as before stated, means hares and rabbits), provides that every occupier of land shall have a right inseparable from his occupation to kill and take ground game thereon, subject to the following limitations:—(1) The occupier and one other person authorised by him in writing have alone the right to kill ground game with firearms; (2) no person may be authorised by the occupier to kill or take ground game except members of his household resident on the land in his occupation, persons in his ordinary service on such land, and any other person *bonâ fide* employed by him for reward for the taking or destruction of ground game. Further, no person is to be deemed an occupier for the purposes of this Act by reason of his having a right of common over such lands, or by reason of an occupation for grazing or pasturage for more than nine months. Otherwise the word "occupier" is not defined in the Act; but it would appear that the Courts will give it the widest possible application (see *Pochin* v. *Smith*, 1887, 52 J. P. 11). It undoubtedly includes an owner who occupies his own land. If the occupier sublet his lands, his rights will pass to the sub-tenant. The rights of the occupier of moorlands and unenclosed lands not being arable under the Act may be exercised, however, only between 11th December in one year to 31st March in the next inclusive; but this provision does not extend to detached portions of moorlands or unenclosed lands adjoining arable lands, when they are less than 25 acres in extent (s. 1, subs. 3).

If the occupier is apart from the Act entitled to kill ground game, he cannot by giving to any other person the right to kill the same divest himself of or alienate his rights under this Act (s. 2), and every agreement or arrangement in contravention of this right is void (s. 3). If in any agreement he inserts a provision purporting so to give up his rights, the effect will be to make void the part of the agreement which relates to his concurrent right to kill ground game, but not to make void the whole agreement (*Beardmore* v. *Minkin*, 1885, L. J. Notes of Cases, 1885, p. 8); and an agreement by the occupier of the farm, who has the sole right of taking hares and rabbits on it, to let the "sole right of killing all winged game, hares, and rabbits" is not void, though it is probable that thereunder the occupier returns his concurrent right to kill ground game (*Morgan* v. *Jackson*, [1895] 1 Q. B. 885). It further appears that this section does not prevent an owner and occupier from entering into an agreement as to the manner in which their respective rights shall be exercised. On this question, see Oke's *Game Laws*, 4th ed., pp. 105, 106.

The Act reserves from its operation all rights to kill and take ground game vested, whether legally or equitably, by lease, contract of tenancy, or other contract made for *bonâ fide* consideration, in any person other than the occupier (s. 5; *Allhusen* v. *Brooking*, 1884, 26 Ch. D. 559), so that the occupier's rights under the Act are postponed until after the determination of such interest; and all leases and agreements, if made prior to the Act whereby the right to ground game was reserved, remain in force just as if the Act had not been passed.

The Act prohibits the use of poison or spring traps except in rabbit holes for the destruction of ground game (s. 6).

See also article GAME LAWS.

[*Authorities.*—Oke's *Game Laws*, 4th ed., by Bund; Warry's *Game Laws of England*; Woolrych on the *Game Laws*.]

Ground Rent.—See LANDLORD AND TENANT; RENT.

Ground Storey.—See LONDON (COUNTY), *Buildings*.

Growing Crops.

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The law relating to growing crops presents certain special features, due to the fact that though in their existing state they form (speaking generally) part of the realty, and consequently pass with it on a grant or mortgage (see *Ex parte Temple*, 1822, 1 G. & J. 216; *Bagnall* v. *Villar*, 1879, 12 Ch. D. 812; *In re Gordon*, 1889, 61 L. T. 299), they change their nature when severed from the soil, and are converted into personal property. Growing crops are of two principal kinds—natural and industrial; and accordingly they are generally referred to as *fructus naturales*, those which are the natural growth of the soil, such as grass, timber, the fruit of trees, etc., and *fructus industriales*, those produced by human labour in sowing and reaping. Emblements, as will be presently explained, are a particular species of the latter class.

Growing crops may be considered from the following points of view:—

1. As the subject of contract of sale.
2. As the subject of the right to emblements.
3. As the subject of distress.
4. As the subject of execution.
5. As the subject of bills of sale.

1. The principal question with regard to the sale of growing crops has been under the Statute of Frauds, namely, when and under what circumstances they fall within the 4th, and when and under what circumstances within the 17th, section. The latter section has now been repealed and re-enacted by the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), ss. 4, 60; but important modifications, as regards the matter now in hand, have been introduced by the substitution, for the expression "goods, wares, or merchandises" in the old enactment, of the simple word "goods," as

defined by sec. 62 of the new Act. This definition, as will be seen presently, has been framed to a great extent with direct reference to the numerous decisions upon the subject. Hence in order to understand the present state of the law, it is still necessary to refer to it as it stood when it was regulated by sec. 17 of the Statute of Frauds; while the decisions with reference to the operation of the 4th section are, as will be seen, also in some degree affected.

The effect of both sets of decisions has, in a book of authority, been expressed thus: "Wherever at the time of the contract it is contemplated that the purchaser should derive a benefit from the further growth of the thing sold, from further vegetation, and from the nutriment to be afforded by the land, the contract is to be considered as for an interest in the land; but where the process of vegetation is over, or the parties agree that the thing shall be immediately withdrawn from the land, the land is to be considered as a mere warehouse of the thing sold, and the contract is for goods. This doctrine has been materially qualified by later decisions, and it appears to be now settled that, with respect to emblements or *fructus industriales* (*i.e.* the corn and other growth of the earth which are produced not spontaneously, but by labour and industry), a contract for the sale of them while growing, whether they are in a state of maturity, or whether they have still to derive nutriment from the land in order to bring them to that state, is not a contract for the sale of any interest in land, but merely for the sale of goods" (1 Wms. *Saund.* 395, ed. 1871).

Considered with reference to the two classes of growing crops already alluded to, the matter has been neatly summarised as follows:—"Growing crops, if *fructus industriales*, are chattels, and an agreement for the sale of them, whether mature or immature, whether the property in them is transferred before or after severance, is not an agreement for the sale of any interest in land, and is not governed by the 4th section of the Statute of Frauds. Growing crops, if *fructus naturales*, are part of the soil *before severance*, and an agreement, therefore, vesting an interest in them in the purchaser before severance is governed by the 4th section; but if the interest is not to be vested till they are converted into chattels by severance, then the agreement is an executory agreement for the sale of goods, wares, and merchandise, governed by the 17th and not by the 4th section of the statute" (Benjamin on *Sale*, 4th ed., by Pearson-Gee and Boyd, pp. 121, 122). The first part of the latter clause must, however, be read as subject to the subsequent decision in *Marshall* v. *Green*, 1875, 1 C. P. D. 35, that the sale of *fructus naturales* is within the 4th section if the property pass before severance, only where an intention can be gathered from the contract that they are to remain in the land for the benefit of the purchaser.

The question may also be looked at from another point of view, according as the right to sever or remove the growing crops is, by the contract, vested in the seller or in the buyer. In the former case the contract is not within the 4th section, either when the crop is to be delivered immediately, or when it is to be delivered at some future time, the purchaser having in the meanwhile nothing to do with it (per Brett, J., *Marshall* v. *Green*, *supra*). In the latter, where the crop is *fructus industriales*, then although they are still to derive benefit from the land after the sale in order to become fit for delivery, the contract is merely one for the sale of goods; and where the crop is *fructus naturales* the same result follows if it is to be severed immediately, because the buyer deriving no benefit from the land, the contract is not for an interest in the

land, but relates solely to the thing sold itself (*ibid.*). The *ratio decidendi* in this case, that the sale of *fructus naturales* is within the 4th section only when it appears from the contract that the parties intended them to remain in the land for the purchaser's benefit, is obviously open to the objection that the Statute of Frauds, as pointed out in a subsequent case by Chitty, J., does not appear to enable parties to a contract, by an appeal to the intention with which they have entered into it, to convert a thing into a chattel which by law is a hereditament (*Lavery* v. *Pursell*, 1888, 39 Ch. D. 508).

But, however this may be, it would seem that the question is now set at rest by the Sale of Goods Act, which expressly extends (s. 62) the scope of "goods" to "emblements, industrial growing crops, *and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.*" It may perhaps be assumed, though the matter cannot be said to be altogether clear, that the italicised words are intended to apply to growing crops as well as to fixtures; for if all *fructus naturales* were left out, the effect of the Act would be to reverse the decision in *Marshall* v. *Green*, and this, it is thought, can hardly have been intended. It would seem that under the latter part of the above definition would fall not only growing crops to be severed by the buyer without delay (as in *Marshall* v. *Green*, *supra*), but also those being *fructus naturales* the severance of which is postponed for the purchaser's benefit to a future period; for they would apparently be still "agreed to be severed . . . under the contract of sale." And it further seems to follow that the line of authorities, beginning with *Crosby* v. *Wadsworth* in 1805 (6 East, 602; 8 R. R. 566), and ending with *Rodwell* v. *Phillips* in 1842 (9 Mee. & W. 502), to the effect that agreements for the sale of *fructus naturales* vesting an interest in them in the purchaser before severance are contracts relating to land, can now no longer be relied upon, since the crops in question may be "goods" within the Sale of Goods Act.

The above statutory provision also sets at rest the question whether *fructus industriales*, though admittedly chattels and not land within the 4th section of the Statute of Frauds, were "goods" within the 17th, a question upon which much doubt was entertained on the part of high authorities (see Benjamin on *Sale*, p. 123, 4th ed.). Both emblements and growing crops are now expressly included in the definition of "goods." It would seem clear that the expression "industrial growing crops" is added in order to comprise those crops which, though owing their existence to skill and labour, are yet not included in the term "emblements," which, as will be presently seen, is confined to crops of that species only which ordinarily repay the labour by which they are produced within the year in which that labour may be bestowed (*Graves* v. *Weld*, 1833, 5 Barn. & Adol. 105). This is the class of products of the soil referred to by Mr. Benjamin, p. 125, as "intermediate" between the *fructus industriales* and the *fructus naturales*; neither annual as emblements nor permanent as grass or trees, but affording either no crop till the second or third year, or affording a succession of crops for two or three years before they are exhausted, such as madder, clover, teasles, etc. With regard to these "it would seem that the crop of the first year would be *fructus industriales*, but that of subsequent years, like fruit or trees planted by tenants, would be *fructus naturales* unless requiring cultivation, labour, and expense for each successive crop, as hops do, in which event they would be *fructus industriales* till exhausted" (Benjamin on *Sale*, p. 128).

A contract for the sale of the produce of growing crops not yet sown

has been held, upon the value proving to exceed £10, to be within the 17th section of the Statute of Frauds (*Watts* v. *Friend*, 1830, 10 Barn. & Cress. 446). This would now, as a contract for the sale of goods to be acquired by the seller after it has been entered into, be a contract for the sale of "future goods" within sec. 5 of the Sale of Goods Act, and consequently also within sec. 4.

Where a contract is entered into for the purchase or hire of land, and the growing crops are purchased as mere accessories to the land, they are considered part of the land (*Mayfield* v. *Wadsley*, 1824, 3 Barn. & Cress. 357, per Littledale, J.), and consequently within the 4th section of the Statute of Frauds (see *Lord Falmouth* v. *Thomas*, 1832, 1 C. & M. 89). In such cases part of the consideration which moves the purchaser to buy the crops is the fact of his having acquired an interest in the land (Benjamin on *Sale*, p. 129). It is presumed that this result is not affected by the Sale of Goods Act.

2. Growing crops form, of course, an important element in the question of the amount of compensation which a tenant becomes entitled to receive, whether under special agreement, by local custom, or by legislative enactment, upon quitting his holding when his interest determines. These matters will be considered hereafter (see TENANT-RIGHT). But the present seems a convenient place for saying a few words on the allied subject of emblements, to which, subject to the observations which follow, a tenant becomes entitled at the end of his term.

As just stated, emblements are growing crops of the "industrial" class, or, to adopt a recognised definition, they are the growing crops of those vegetable productions of the soil which are annually produced by the labour of the cultivator (Wharton's *Law Dict. sub. voc.*). Only those growing crops are included in the term which, *under ordinary circumstances*, repay the labour of producing them within the year in which that labour is bestowed (see *Graves* v. *Weld*, 1833, 5 Barn. & Adol. 105, per Lord Denman, C.J.). But where this is the case the crops do not cease to be emblements by reason of accidental circumstances which may in a particular case have delayed the production beyond that time (*s. c.*). On the other hand, the fact that a natural product like grass has been sown from seed and has been improved and increased by care and cultivation, does not bring it within the scope of emblements, unless, like clover, it be purely of an artificial kind (1 Williams, *Executors*, p. 625, 9th ed.). So trees which are a "permanent or natural profit of the earth" (*fructus naturales*) are not within the designation, whether they bear fruit or not (*Co. Litt.* 55 *b*; 2 Black. *Com.* 123). Mention has already been made of the fact that the right of the tenant to treat crops as emblements has been extended to those which, though not maturing within a year, yet require, in the year when they are gathered, so much cultivation and expense, like hops, as may be "deemed equivalent to the sowing and planting of other vegetables" (*Latham* v. *Atwood*, 1639, Cro. (3) 515, as explained in *Graves* v. *Weld*, *ubi supra*). But he is in no case entitled to more than one crop, being the crop growing in that year in which his interest determines (*Graves* v. *Weld*, *ubi supra*).

But it is not every tenant, of course, who can claim emblements. The principle on which the claim is founded being that a tenant should be encouraged to cultivate by being sure of receiving the fruits of his labour (*Graves* v. *Weld*, *ubi supra*), it cannot apply either where the tenancy is one of defined duration, or where it is determined by his own act; for in either case the loss of such fruits would clearly lie at his own door. Consequently, for the claim to arise at all, it is necessary that both the following conditions should

be fulfilled: the determination of the tenant's interest must depend on an event (1) which is uncertain, (2) which is independent of his own will. Illustrations of "uncertainty" within the meaning of the rule are in the case of a tenancy for life, either of the tenant himself or of some other person (*Co. Litt.* 55 *b*), or for years determinable on life (*ibid.*), or from year to year (*Kingsbury* v. *Collins*, 1827, 4 Bing. 202; 29 R. R. 534), or at will (*Litt.* s. 68). Cases of fulfilment of the second condition are where the determination is due to the act of God (as where a tenant for life dies, *Co. Litt.* 55 *b*), or of the law (2 Black. *Com.* 123), or of the lessor where the tenancy is at will (*Co. Litt.* 55 *b*). On the other hand, in the case of surrender or forfeiture by the lessee, he loses his right to emblements (Com. *Dig. Biens* (G. 2)); and, on the same principle, so does a parson who resigns his living (*Bulwer* v. *Bulwer*, 1819, 2 Barn. & Ald. 470; 21 R. R. 358). And for this result to ensue it is sufficient that the lessee's act be the indirect cause of the determination, provided that the direct cause is the natural and immediate consequence of such act (see *Davis* v. *Eyton*, 1830, 7 Bing. 154). On the determination, however, of the lessee's interest by his own act, and the consequent loss of his right to emblements, the rights of a sub-tenant holding under him are preserved (2 Black. *Com.* 124).

Emblements which, of course, are personal property, and indeed, as already seen, expressly within the Sale of Goods Act, belong to the tenant himself, his devisee, or his personal representatives (2 Black. *Com.* 404), to whom, as against the heir, they pass on the tenant's death (1 Williams, *Executors*, 623). As between the executor, however, and a devisee of the land, they belong to the latter, unless made the subject of an express bequest (Shep. *Touch.* 472). And to take the case out of this rule, the express bequest to the legatee must be clear; a bequest, for instance, of all goods, etc., "personal estate and effects . . . not thereinbefore specifically bequeathed" has been held insufficient (*Cooper* v. *Woolfitt*, 1857, 2 H. & N. 122). But though there has been one decision (*Vaisey* v. *Reynolds*, 1828, 5 Russ. 12) to the contrary, a bequest of the "stock" upon a farm has uniformly been held to pass the emblements and crops growing on the testator's land at the time of his death (*Cox* v. *Godsalve*, 1698, 6 East, 604 *n*; *West* v. *Moore*, 1807, 8 East, 339; 9 R. R. 460; *Blake* v. *Gibbs*, 1825, 5 Russ. 13 *n*; *Rudge* v. *Winnall*, 1849, 12 Beav. 357; *In re Roose*, 1880, 17 Ch. D. 696).

In order to exercise his right to emblements, where it exists, the tenant has free entry, egress, and regress to and from the premises after the determination of his interest (*Co. Litt.* 56 *a*); and this privilege extends to his grantee (Shep. *Touch.* 244), and to a third person who has been permitted by him to sow the land on the terms of sharing the crop with him (*Kingsbury* v. *Collins*, *supra*). He has, however, no right to exclusive occupation of the land, and it seems doubtful, if he or his executors occupy it till the emblements are ripe, whether the landlord may not maintain use and occupation (1 Williams, *Executors*, 632).

The exercise of the right to emblements being obviously open to the objection that it interferes with the undisturbed cultivation of the land in the hands of its existing occupiers, the Legislature interfered in 1851 with an Act (14 & 15 Vict. c. 25, s. 1) by which the right in question was abolished, compensation being given by prolonging the tenant's term until the expiration of his then current year. But the Act, which applies to "any farm or lands," extends only to those held by tenants at a rack-rent. Consequently the old law, as set out briefly above, is still of importance, and would usually obtain, for example, as between the personal representatives of a tenant for life and the remainderman. It has been held that the

Act in question, which relates to tenancies determining "by the death or cesser of the estate of any landlord for his life or for any other uncertain interest," applies to all tenancies in respect of which, but for the Act, there might have been a claim to emblements, and therefore to the tenancy of a cottage with about an acre of land, partly cultivated as a garden and partly sown with corn and planted with potatoes (*Haines* v. *Welch*, 1868, L. R. 4 C. P. 91). The Act further provides that the succeeding landlord shall be entitled to recover from the tenant a fair proportion of the rent from the time of the death or cesser of the estate of his predecessor to the time of the tenant's quitting; and this has been held to justify the recovery of such rent by distress (*s. c.*).

3. At common law a distress was only a pledge in the hands of the distrainor (see DISTRESS). Consequently nothing could be seized which the distrainor would have been unable to restore in the same condition as when it was taken (*Simpson* v. *Hartopp*, 1744, Willes, 512; 1 Smith, *L. C.* 421, 10th ed.). Growing crops were therefore privileged from distress (1 Ro. *Ab.* 666). But this immunity was done away with by Stat. 11 Geo. II. c. 19, which expressly empowers (s. 8) a landlord to distrain upon "all sorts of corn and grass, hops, roots, fruit, pulse, or other product whatsoever" (*sc.* of the same nature as corn, roots, etc.) (*Clark* v. *Gaskarth*, 1818, 8 Taun. 431; 20 R. R. 516), "which shall be growing" on the demised lands: to cut, gather, and lay them up when ripe in a barn or other proper place thereon, or failing such place, then in some barn or proper place as near as may be to the premises: and in convenient time to appraise and sell them to meet the rent due and the expenses, such appraisement to be taken when they are cut and gathered, and not before. And notice of the place of deposit must (by s. 9) be given to the tenant within a week. This enactment seems to place a distress on growing crops on a different footing to a distress on other goods in three respects:—First, the impounding *must* take place on the demised premises, unless there be no barn or other proper place thereon; and the distrainor has not, as in other cases, the option of impounding the distress off the premises, or (under 11 Geo. II. c. 19, s. 10) on the premises. Secondly, the abolition of the necessity for the appraisement of distrained goods (by the Law of Distress Amendment Act, 1888, 51 & 52 Vict. c. 21, s. 5), except at the written request of the tenant or owner, would appear not to apply to growing crops, because their appraisement is specially required, as just seen, by the Stat. 11 Geo. II. c. 19, s. 8, and not by the Stat. 2 Will. & Mary, sess. 1, c. 5, s. 2, to which alone the Act of 1888 refers. Thirdly, the option which the distrainor still has of holding the distress as a pledge in lieu of selling it (see *Philpott* v. *Lehain*, 1876, 35 L. T. 855) would seem not to apply in the case of growing crops, the sale of which has been said to be probably compulsory (*Piggott* v. *Birtles*, 1836, 1 Mee. & W. 441, per Parke, B.).

But as growing crops were thus made distrainable by statute, they enjoyed, like other goods, absolute privilege from distress when they had been once seized in execution by the sheriff; and when, after sale to a purchaser, they were in such a state as not to be capable of being severed and removed, the privilege extended to protect them from a distress for rent due after such sale (see *Peacock* v. *Purvis*, 1820, 2 B. & B. 362; 23 R. R. 465; *Wharton* v. *Naylor*, 1848, 12 Q. B. 673; *In re Benn-Davis*, 1885, 55 L. J. Q. B. 217). But the Landlord and Tenant Act, 1851 (14 & 15 Vict. c. 25), now provides (s. 2) that in case all or any part of the growing crops of the tenant of any farm or lands shall be seized and

sold by any sheriff or other officer under a writ of execution, they shall, so long as remaining on the lands, in default of sufficient distress of the goods and chattels of the tenant, be liable to distress for any rent accruing due after such seizure and sale, notwithstanding any bargain and sale or assignment of such growing crops by the sheriff. Growing crops taken in execution are therefore, in the present state of the law, only conditionally privileged from distress.

It may be added here that where growing crops are distrained with other things for which conditional privilege is claimed, their value is not to be taken into account in deciding whether that claim has been made good, inasmuch as only those things are to be reckoned *which are immediately available* to meet the arrears of rent by sale (*Piggott* v. *Birtles*, *supra*).

4. The distinction, as it affects growing crops, between things liable to execution under a writ of *fieri facias* and things not so liable, corresponds very closely to the distinction which has already been pointed out between *fructus industriales* and *fructus naturales*. The former, which belong to the executor as against the heir, and which are now "goods" within the Sale of Goods Act, can alone be seized under that writ by the sheriff. Thus while growing fruit, for instance (*Rodwell* v. *Phillips*, 1842, 9 Mee. & W. 501, per Lord Abinger, C.B.), or a growing crop of meadow-grass (Watson on *Sheriffs*, 2nd ed., p. 253), could not be levied upon, growing potatoes (*Evans* v. *Roberts*, 1826, 5 Barn. & Cress. 829; 29 R. R. 421, per Bayley, J.; *Anderson* v. *Radcliffe*, 1858, El. B. & E. 806), or crops of corn (*Poole's* case, 1703, 1 Salk. 368, per Holt, C.J.) and after-eatage of stubble (*Jones* v. *Flint*, 1839, 10 Ad. & E. 753, per Lord Denman, C.J.) are within the rule. But a sheriff only has authority to sell the crop as it stands, and cannot recover expenses incurred in cutting, carrying, or preparing it as part of the costs of the execution (*In re Woodham*, 1887, 20 Q. B. D. 40).

The power of the sheriff to seize growing crops in execution has, however, been greatly curtailed by an Act which was passed in 1816 to regulate the sale of farming stock taken in execution. Under the provisions of this Act (56 Geo. III. c. 50), a sheriff selling under an execution may not allow to be carried off from the land "any straw, threshed or unthreshed, or any straw of crops growing, or any chaff, colder, or any turnips, or any manure, compost, ashes, or seaweed, in any case whatsoever; nor any hay, grass, or grasses, whether natural or artificial, nor any tares or vetches, nor any roots or vegetables, being produce of such lands," in any case where any covenant or written agreement with the landlord, of which the sheriff shall have had notice in writing, may forbid their removal from the land (s. 1). The tenant is bound to give written notice of the existence of such covenants to the sheriff, who is in his turn bound to inform the landlord and his agent of the execution (s. 2). But the sheriff may dispose of such crops or produce to any person who may agree with him in writing to expend them on the land, in accordance with any covenant or agreement, or (failing that) in accordance with the custom of the country (s. 3). The Act further provides that no sheriff shall, by virtue of any process whatsoever, sell or dispose of any "clover, rye-grass, or any artificial grass or grasses whatsoever, which shall be newly sown and be growing under any crop of standing corn" (s. 7); also that no assignee of any bankrupt, or under any bill of sale, nor any purchaser of the goods, chattels, stock, or crop of any person employed in husbandry on any lands let to farm, shall take or sell any "hay, straw, grass, or grasses, turnips, or other roots, or any other produce

of such lands" in any other manner and for any other purpose than the person could have done through whom he claims (s. 11). The trustee in bankruptcy has been held to be bound by this provision, though in pursuance of his rights he may actually have disclaimed the lease (*Lybbe* v. *Hart*, 1885, 29 Ch. D. 8). The word "purchaser" in this provision is to receive its ordinary construction, and is not cut down by virtue of the title and preamble of the statute to a purchaser from the sheriff (*Wilmot* v. *Rose*, 1854, 3 El. & Bl. 563). It only applies, however, to a person who buys from the tenant, and not, for instance, to one who buys from the landlord selling under a distress (*Hawkins* v. *Walrond*, 1876, 1 C. P. D. 280).

Growing crops are also subject to seizure under a writ of sequestration (see *Dickinson* v. *Smith*, 1813, 4 Madd. 177).

5. Growing crops were not personal chattels within the Bills of Sale Act (17 & 18 Vict. c. 36) of 1854 (*Brantom* v. *Griffiths*, 1877, 2 C. P. D. 212). By the Act of 1878 (41 & 42 Vict. c. 31), however, that term is made specifically to include them "when separately assigned or charged," but not "when assigned together with any interest in the land on which they grow" (s. 4): with the further proviso that that term is not to include "any stock or produce upon any farm or lands which, by virtue of any covenant or agreement, or of the custom of the country, ought not to be removed from any farm where the same are" at the date of the bill of sale (*ibid.*). (The effect of such last-mentioned covenant or agreement, under the Statute 56 Geo. III. c. 50, in the case of a purchase from the tenant, has already been referred to.) The Act of 1878 goes on to provide (s. 7) that no growing crops shall be deemed to be separately assigned or charged by reason only that they are assigned by separate words, or that power is given to sever them from the land on which they grow, without otherwise taking possession of or dealing with such land, if by the same instrument any freehold or leasehold interest in the land on which such crops grow is also conveyed or assigned to the same person. And the Act of 1882 (45 & 46 Vict. c. 43), after providing for the avoidance, except as against the grantor, of every bill of sale, in respect of all personal chattels comprised in it, but not specifically described in the schedule (s. 4), and also in respect of chattels of which, though specifically described, the grantor was not the true owner at the time of the execution of the bill of sale (s. 5), goes on to enact (s. 6) that "nothing contained in the foregoing sections of this Act" (compare *Tennant* v. *Howatson*, 1888, 13 App. Cas. 489) shall render a bill of sale void in respect of any growing crops separately assigned or charged, where such crops were actually growing at the time when the bill of sale was executed. Under this provision, the expression "separately assigned or charged" is to receive the same construction as in the Act of 1878 (per Lindley, L.J., in next cited case). Consequently growing crops are deemed to be so assigned within it, if assigned apart from any interest in land, though assigned along with personal effects (*Roberts* v. *Roberts*, 1884, 13 Q. B. D. 794).

It has been decided (under the Act of 1854), that though a bill of sale, as already mentioned, did not require registration in respect of growing crops at all, yet, inasmuch as when the crops were subsequently severed by the grantor they became personal chattels, the bill of sale, in order to protect them, required registration (*Ex parte National Mercantile Bank*, 1880, 16 Ch. D. 104). It is presumed that the same principle would apply under the present Acts to growing crops not "separately assigned."

Where the tenant of a farm assigned by a bill of sale his present and

future growing crops, stock, and effects, whether on the farm or elsewhere, by way of mortgage, it was held that the description of the future crops was, so far as those on the farm were concerned, sufficiently specific to make a valid assignment of them in equity (*Clements* v. *Matthews*, 1883, 11 Q. B. D. 808).

Guarantee.

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Definition.—The contract of guarantee, or, as it is sometimes called, the contract of principal and surety, which may be defined as a contract to pay a debt or perform a duty in the event of another person, who is primarily liable, not paying such debt or performing such duty, is apt to be confounded with other contracts, in particular with the contracts of indemnity and insurance. Many definitions of guarantee include indemnity, the right of contribution, the contract of insurance, and the contract of a *del credere* agent. There is a sense in which the contract of indemnity includes guarantee; it has been remarked that every promise to become answerable for the debt or default of another may be expressed as an indemnity (*Green* v. *Cresswell*, 1839, 10 Ad. & E. p. 458). But a distinction exists between a promise to pay the creditor if the principal debtor makes default, and a promise to keep a person who has entered, or is about to enter, into a contract of liability indemnified against that liability, independently of the question whether a third person makes default or not (*Guild* v. *Conrad*, [1894] 2 Q. B. p. 896; *Thomas* v. *Cook*, 1828, 8 Barn. & Cress. 732). A lessor demises premises under a lease containing a covenant to pay the rent reserved; the lessee assigns his interest; the relation of lessor to lessee after assignment is not one of principal and surety; throughout the term a primary liability subsists between the lessor and lessee, and not the less so that the assignee is bound to indemnify the lessee (*Baynton* v. *Morgan*, 1888, 22 Q. B. D. 74). Many companies issue "guarantee policies." The use of the word "policy" or "insurance" does not necessarily determine whether a contract is one of insurance or guarantee; the whole contract must be looked at in order to ascertain its real nature, and whether the parties contemplated the rights and duties of principal and surety or of assurer and assuree (see dissenting judgment of Kay, L.J., in *Dane* v. *Mortgage Insurance Co.*, [1894] 1 Q. B. 54).

Lord Selborne, in *Duncan Fox, & Co.* v. *New South Wales Bank*, 1880, 9 App. Cas. p. 11, in which the position of an indorsee of a bill of exchange was considered, divided contracts of surety into three classes: "(1) Those in which there is an agreement to constitute, for a particular purpose, the relation of principal and surety, to which agreement the creditor thereby secured is a party; (2) those in which there is a similar agreement between the principal and surety only, to which the creditor is a stranger; and (3) those in which, without any such contract of suretyship, there is a primary and secondary liability of two persons for one and the same debt, being, as between the two, that of one of these persons only, and not equally of both, so that the other, if he should be obliged to pay it, would be entitled to reimbursement

from the person by whom (as between the two) it ought to have been paid."

The House of Lords decided that the contract of an indorsee was within the third class; "cases in which there is, strictly speaking, no contract of suretyship, but in which there is a primary and secondary liability of two persons for one and the same debt, by virtue of which, if it is paid by the person who is not primarily liable, he has a right of reimbursement or repayment from the other" (1880, 9 App. Cas. p. 11).

The Form of Contract.—At common law a contract of guarantee need not be in writing. This, however, was altered by sec. 4 of the Statute of Frauds, 29 Car. II. c. 3, which enacted that: "No action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriages of another person," etc., "unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised."

The authorities do not state whether the above words "any special promise to answer for the debt, default, or miscarriages of another," or the same words in the Mercantile Law Amendment Act, 1856, are an exhaustive definition of the contract of guarantee, a word which is not found in the Statute of Frauds. But probably they are intended to be such.

The following are some of the chief points established as to the above section of the Statute of Frauds:—

(*a*) The contract of guarantee must be collateral, accessory, or subsidiary (to quote phrases often used) to another contract or obligation in existence or in contemplation (*Birkmyr* v. *Darnell*, 1705, 1 Sm. *L. C.*, 10th ed., 287). The contract which is to be guaranteed need not actually exist at the time of the contract of guarantee (*Mountstephen* v. *Lakeman*, 1874, L. R. 5 Q. B. 613; L. R. 7 Q. B. 197; L. R. 7 H. L. 17). The rule "*fidejussor et præcedere obligationem et sequi potest*" (*Inst.* xx. 3) holds good, but the parties must have intended that there should be a principal debtor. Hence, in such cases as *Anstey* v. *Marden* (1804, 1 Bos. & P. N. R. 124; 8 R. R. 713), where there is a novation or purchase of a debt, the statute does not apply.

It might have been supposed that the contract of a *del credere* (*q.v.*) agent, who for a special commission makes himself answerable for the debt or default of a customer, was within the statute; but for reasons which cannot now be questioned, it has been held that such a contract is not within the statute (*Couturier* v. *Hastie*, 1852, 8 Ex. Rep. 40; 9 Ex. Rep. 102; 5 H. L. 673; *Sutton* v. *Grey*, [1894] 1 Q. B. 285).

(*b*) The promise must be to "another person," *i.e.* not to the debtor but to the creditor, or, as it is sometimes expressed, "there must be privity between the principal creditor and the surety." "The statute applies," said Parke, B., in *Hargreaves* v. *Parsons* (1844, 13 Mee. & W. 561), "only to promises, made by the persons to whom another is already, or is to become, answerable. It must be a promise to be answerable for a debt or default in some duty by that other person towards the promisee. This was decided, and no doubt rightly, by the Court of Queen's Bench in *Eastwood* v. *Kenyon*" (1840, 11 Ad. & E. 438) and in *Thomas* v. *Cook* (1828, 8 Barn. & Cress. 728). See also in *In re Boyle*, [1893] 1 Ch. p. 99.

(*c*) The words of sec. 4, "default or miscarriages," include liability not merely for debts but for wrongful acts or torts (*Kirkham* v. *Marter*, 1819, 2 Barn. & Ald. 613; 21 R. R. 416).

(*d*) There must be consideration to support a contract of guarantee not under seal (*Barrell* v. *Trussell*, 1811, 4 Taun. 117; *Semple* v. *Pink*, 1847, 1 Ex. Rep. 74). The contrary was once supposed; an idea no doubt suggested by the fact that the consideration is not, as a rule, an advantage accruing to the promisor, but some detriment or inconvenience suffered, or advantage parted with, by the principal creditor.

What is "consideration" depends on the general law as to contracts. Here it may be stated that a binding promise not to sue the debtor is sufficient consideration. It has also been held that if the guarantor requests the creditor to forbear suing, and the creditor on such request does in fact forbear to sue, although he does not at the time of the request bind himself not to sue, there is good consideration (*Crears* v. *Hunter*, 1887, 19 Q. B. D. 341; *Miles* v. *New Zealand Alford Estate Co.*, 1886, 32 Ch. D. 266).

(*e*) The consideration need not be in writing. In *Wain* v. *Warlters* (1804, 5 East, 10; 1 Sm. *L. C.*, 10th ed., 310; 7 R. R. 645) it was decided that the words of sec. 4, "the agreement" or "some memorandum thereof" included the consideration, and that a document which did not specify the consideration did not satisfy the statute. The law as thus declared proved inconvenient to the mercantile community, and was altered by the Mercantile Law Amendment Act, 19 & 20 Vict. s. 3, which states that: "No special promise to be made by any person after the passing of this Act to answer for the debt, default, or miscarriages of another person, being in writing and signed by the party to be charged therewith, or some other person by him thereunto authorised, shall be deemed invalid to support an action, suit, or other proceeding to charge the person by whom such promise shall have been made, by reason only that the consideration for such promise does not appear in writing, or by necessary inference from a written document."

(*f*) The words of the 4th section of the Statute of Frauds are: "No action will lie"; a verbal grant is not null and void, and the Courts have held that, for certain purposes, a verbal guarantee may be valid. For example, a verbal guarantee may be a good ground of defence (*Lavery* v. *Turley*, 1860, 30 L. J. Ex. 49).

(*g*) There must be no liability on the part of the surety prior to that which arises from the contract of guarantee (*Fitzgerald* v. *Dressler*, 1859, 7 C. B. N. S. 374; *Sutton* v. *Grey*, [1894] 1 Q. B. 285).

(*h*) An alteration of a contract within the statute must be in writing (*Emmet* v. *Dewhurst*, 1851, 3 Mac. & G. 587).

Some of the earlier decisions assimilated a contract of guarantee to a contract of insurance, and made it obligatory for the person guaranteed or the principal creditor to disclose to the guarantor all material facts. It is now settled that this obligation does not exist. The clearest statement of the law on this point is given by Blackburn, J., in *Lee* v. *Jones*, 1864, 17 C. B. N. S. 503; 14 C. B. N. S. 386: "When the creditor describes to the proposed sureties the transaction proposed to be guaranteed (as in general a creditor does), that description amounts to a representation, or at least is evidence of a representation, that there is nothing in the transaction that might not naturally be expected to take place between the parties in a transaction such as that described. And, if a representation to this effect is made to the intended surety by one who knows that there is something not naturally to be expected to take place between the parties to the transaction, and that this is unknown to the person to whom he makes the representation, and that, if it were known to him he would not enter into

the contract of suretyship, I think it is evidence of a fraudulent representation on his part. . . . I think that it must in every case depend upon the nature of the transaction whether the fact not disclosed is such that it is impliedly represented not to exist, and that must be generally a question of fact proper for a jury."

Construction of the Contract.—In recent times the Courts have applied to guarantees the ordinary principles of construction, regard being had to the surrounding circumstances (*Morrell* v. *Cowan*, 1877, 7 Ch. D. 151). The two questions of construction which oftenest arise are: (1) whether the guarantee is for the whole or part of the debt guaranteed; (2) whether it is a continuing guarantee. If the guarantee is for the whole debt, the creditor can on default recover the whole from the surety, leaving him to obtain contribution from his co-sureties, if any. If the guarantee is only for part of the debt, the surety on payment of that part steps into the shoes of the debtor; he is entitled to prove *pro tanto* in place of the principal creditor (*In re Sass*, [1896] 2 Q. B. 12). If the surety guarantees the whole debt, his right of proof remains in abeyance until the whole debt is paid (*Ellis* v. *Emmanuel*, 1876, 1 Ex. D. 157). Whether a guarantee is for the whole or part of a debt is a question of construction of the entire document. But certain rules on the subject have been formulated, one being to the following effect: "Where the surety has given a continuing guarantee, limited in amount, to secure the floating balances which may from time to time be due from the principal to the creditor, the guarantee is, as between the surety and the creditor, to be construed, both at law and in equity, as applicable only to a part of the debt, co-extensive with the amount of his guarantee" (*Ellis* v. *Emmanuel*, 1876, 1 Ex. D. 164). "Where the guarantee limited in amount is for a debt already ascertained which exceeds that limit (no case decides that), it is *primâ facie* to be construed as security for part of the debt only." Whether it is for the whole or part is, in these "circumstances, a question of construction of the particular document" (p. 168).

Revocation.—Unless the contrary is agreed, a guarantee is revocable as to future transactions at any time, unless the guarantee is for some transaction not completed, or for some continuing consideration (*Lloyd* v. *Harper*, 1880, 16 Ch. D. 290).

Duties of Surety to Creditor.—Chief of these is the duty of the surety to pay on default by the debtor; a duty which arises, unless the contrary is stipulated, without notice by the creditor. According to English law, the creditor is not bound to take proceedings against the debtor, or to realise securities in his possession, before enforcing his rights against the surety. The latter will not be bound by a judgment or award against the debtor or admission by him; unless the contrary is stipulated, he is entitled to have the debt proved (*Ex parte Young*, 1881, 17 Ch. D. 668).

Duties of Creditor to Surety.—Of these the chief is the duty of the creditor to surrender to him all securities, etc. (*beneficium cedendarum actionum*). This rule applies to securities received before or after the date of the guarantee (*Bechervaise* v. *Lewis*, 1872, L. R. 7 C. P. 372; *Forbes* v. *Jackson*, 1882, 19 Ch. D. 615, 621), even though the surety was unaware of their existence. Sec. 5 of the Mercantile Law Amendment Act provides: "Every person who, being surety for the debt or duty of another, or being liable with another for any debt or duty, shall pay such debt or perform such duty, shall be entitled to have assigned to him or to a trustee for him, every judgment, specialty, or other security which shall be held

by the creditor in respect of such debt or duty, whether such judgment, etc., shall or shall not be deemed at law to have been satisfied by the payment of the debt or the performance of the duty, and such person shall be entitled to stand in the place of the creditor and to use all the remedies, and, if need be, upon a proper indemnity, to use the name of the creditor, in any action, or other proceedings, at law or in equity, in order to obtain from the principal debtor or any co-surety, co-contractor, or co-debtor, as the case may be, indemnification for the advances made and loss sustained by the person who shall have so paid such debtor or performed such duty; and such payment, etc., so made by such surety shall not be pleadable in bar of any such action or proceeding by him: provided always that no co-surety, co-contractor, or co-debtor shall be entitled to recover from any other co-surety, co-contractor, or co-debtor, by the means aforesaid, more than the just proportion to which, as between those parties themselves, such last-mentioned person shall be justly liable" (19 & 20 Vict. c. 97, s. 5).

Indorsers of a bill of exchange, who are in a sense sureties, cannot so avail themselves of the above rule as to prevent an indorsee of a bill dealing during its currency as he thinks fit with securities (*Duncan, Fox, & Co.* v. *New South Wales Bank*, 1880, 6 App. Cas. 1).

It would seem that the surety may require the creditor to sue the debtor when the debt becomes due (De Colyar, p. 318).

The surety may plead the rights of set off which the debtor could have set up (*Murphy* v. *Glass*, 1869, L. R. 2 P. C. 408; 36 & 37 Vict. c. 66, s. 24 (2)). (See Guillouard, p. 257.)

Duties of Debtor to Surety.—It is the duty of the debtor to repay the surety who has satisfied the debt or obligation, and the latter may recover by action money so paid. In Roman law the surety was entitled in certain cases to take proceedings before payment against the debtor, *e.g.* if the debtor allowed an unreasonable time to elapse without paying; and most modern codes recognise such a rule. On this point there is little authority in English law. But it seems that if the debt has become due, and the creditor for some reason refuses to sue, the surety may take proceedings to compel the debtor to pay (Willes, J., in *Bechervaise* v. *Lewis*, 1872, L. R. 7 C. P. 372, 377).

On being sued, the surety may bring in the principal debtor as third party (*Ex parte Young, In re Kitchin*, 1881, 17 Ch. D. 670).

Duties between Co-Sureties.—A surety who has paid the debt of the creditor has the right to proportionate contribution from the co-sureties, according to the measure of their liability; and it seems also that a surety is entitled, *before payment*, to call up his co-sureties for contribution (*Wolmershausen* v. *Gullick*, [1893] 2 Ch. 514).

The right to contribution exists, unless the contrary is stipulated, where the sureties are bound jointly and severally, or jointly or severally, wholly under the same or different instruments (see, however, *Coope* v. *Twynam*, 1823, 1 Turn. & R. 426; 24 R. R. 89). In equity the contribution was determined by the rule of *solvent* co-sureties, and the rule is now followed (Judicature Act, 1873, s. 25). Cp., as to mode of apportionment, *Ellesmere Brewery Co.* v. *Cooper*, [1896] 1 Q. B. 81.

Discharge of Surety.—The grounds of rescission which are applicable to guarantees and other contracts need not be here considered: reference can be made briefly only to some grounds of defence special to guarantees. The following are some of the chief grounds of discharge of surety:—(*a*) *Discharge of surety by extinction of the principal contract—Cum causa principalis no*

consistit, nec ea quidem quæ sequuntur locum habent. Thus if a creditor voluntarily releases the debtor or executes a deed of composition, the surety will be discharged, in the absence of a reservation of rights against him (*Commercial Bank of Tasmania* v. *Jones*, [1893] App. Cas. 313). This principle does not apply to release by operation of law (see Bankruptcy Act, 1883, s. 3 (19), and Bankruptcy Act, 1890, p. 30 (4); also see Kay, J.'s, decision, *Yorkshire Rwy. Waggon Co.* v. *Maclure*, 1881, 19 Ch. D. 478).

(*b*) *Discharge by death of one or more of the parties, or by a change in the parties to the contract.*—At common law a contract of guarantee was rescinded as to future transactions by the death of one of the parties thereto if the guarantee could have been terminated by the guarantor himself by notice, unless an intention to the contrary appeared therein. It might have been thought that the effect of any change in the parties to whom, or for or in respect of whom, a guarantee was given, whether by increase or decrease, consolidation of one firm with another, or amalgamation of one company with another, would have been to release the guarantor. But the early cases on this point were not clear: some of them turned on nice distinctions as to the nature of the business (see authorities collected in De Colyar, pp. 279 *et seq*; Fell, p. 122). On this point the Partnership Act, 1890, 53 & 54 Vict. c. 39, s. 18 (which appears to reproduce the Mercantile Law Amendment Act, 1856, s. 4), enacts: "A continuing guaranty or cautionary obligation, given either to a firm or to a third person in respect of the transactions of a firm is, in the absence of an agreement to the contrary, revoked as to future transactions by any change in the constitution of the firm to which, or of the firm in respect of the transactions of which, the guarantee or obligation was given."

(*c*) *Discharge by change in contract.*—A surety will be discharged by any change in the guaranteed contract between the principal debtor and creditor without the consent of the surety, unless the change is manifestly immaterial, or is to the advantage of the surety (*Holme* v. *Brunskill*, 1872, 3 Q. B. D. 495). "The true rule in my opinion is, that if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and that, if he has not been consulted, although in cases where it is, without inquiry, evident that the alteration is unsubstantial, or that it cannot be otherwise than beneficial to the surety, the surety may not be discharged; yet, that if it is not self-evident that the alteration is unsubstantial, or one which cannot be prejudicial to the surety, the Court will not, in an action on the guarantee, go into an inquiry into the effects of the alteration . . . in such a case the surety himself must be the sole judge whether or not he will consent to remain liable" (*s.c.* at p. 505).

(*d*) *Discharge of the surety by acts, etc., of the creditor.*—Only a few of the common classes of cases in which a surety is discharged by acts, omissions, or laches on the part of the principal creditor can be mentioned. The surety will be *pro tanto* discharged if the principal creditor surrenders a security for the debt, or substitutes a new security. The creditor is bound to use due care or diligence in preserving securities in the state in which he received them; and the surety will be discharged *pro tanto* if such securities are impaired or deteriorated (*Pearl* v. *Deacon*, 1857, 24 Beav. 186; and remarks of Lord Watson in *Taylor* v. *Bank of New South Wales*, 1886, 11 App. Cas. p. 603).

Alteration in the Contract of Creditor and Debtor.—Discharge by giving time.—A surety is not discharged by the mere fact that the creditor gives the debtor time to pay the debt or perform the duty guaranteed; but the surety is discharged, if there is a binding contract to give time

(*Howell* v. *Jones*, 1834, 1 C. M. & R. 97). This result may be prevented if the creditor stipulates that giving time shall not discharge the surety.

Discharge by laches of the creditor.—It is impossible to refer to more than a few of the classes of cases in which the surety is released by reason of acts or omissions on the part of the creditor to the prejudice of the surety. To refer to one common class of guarantees given to employers for the good behaviour of servants: mere negligence on the part of the employer in detecting delinquencies of the servant will not be a defence to an action against the surety (*Guardians of Mansfield* v. *Wright*, 1882, 9 Q. B. D. 688). Otherwise, if there has been an omission by the creditor of the performance of some duty, to the injury of the surety (*Watts* v. *Shuttleworth*, 1860, 7 H. & N. 235); and retention of a servant, whose good behaviour has been guaranteed, after knowledge of acts of dishonesty justifying dismissal, would exonerate the surety.

As to release of co-surety, see *Bonser* v. *Cox*, 1834, 4 Beav. 379; *Ward* v. *National Bank of New Zealand*, 1883, 8 App. Cas. 755.

Bills of Exchange and Principal and Surety.—It is now settled that parol evidence may be given that the true contract between parties to a bill of exchange or promissory note, instead of being merely that which the law merchant implies, is that of principal and surety (remarks of Lord Watson in *Macdonald* v. *Whitfield*, 1883, 8 App. Cas. p. 745; Chalmers on *Bills of Exchange*, 5th ed., p. 220).

[*Authorities.*—The above account of the contract of guarantee necessarily omits reference to many branches of the subject. For further information see BANKRUPTCY; INDEMNITY; LIFE INSURANCE; PRINCIPAL AND SURETY; De Colyar on *Guarantees*, 3rd ed.; Throop on *The Validity of Verbal Agreements*; Fell on *Mercantile Guarantees*; and Guillouard, *Traité du Cautionnement: Motive zu dem Entwurfe eines Bürgerlichen Gesetzbuches*, vol. ii. ss. 668, 669.]

Guarantee Society.—See GUARANTEE; LIFE INSURANCE.

Guardian ad litem.—A guardian *ad litem* is a person who defends an action or other proceedings on behalf of a party defendant who is under disability, owing either to infancy or want of mental capacity.

INFANTS, IN CASE OF.—Service of a writ or summons on an infant is effected by serving it on his father or guardian, or if none, then upon the person with whom the infant resides, or under whose care he is (R. S. C., 1883, Order 9, r. 4).

Infants may, in the manner heretofore practised in the Chancery Division, defend by their guardians appointed for that purpose (Order 16, r. 16)

Appearance.—An infant cannot appear except by a guardian *ad litem*. No order is required for the appointment of such guardian (as was the case under the old practice), but the solicitor applying to enter the appearance must make and file an affidavit in the prescribed form (Order 16, r. 18). Similarly, where an infant is served with a petition, notice of motion, or summons, he must appear at the hearing by guardian *ad litem* in all cases in which the appointment of a special guardian is not provided for (Order 16, r. 19).

Default of Appearance.—Where no appearance has been entered to a writ of summons for a defendant who is an infant, the plaintiff must, before proceeding further with the action against the defendant, apply to the

Court or a judge for an order that some proper person be assigned guardian of such defendant, by whom he may appear and defend the action. But no such order will be made unless it appears, on the hearing of such application, that the writ of summons was duly served, and that notice of such application was, after the expiration of the time allowed for appearance, and at least six clear days before the day in such notice named for hearing the application, served upon or left at the dwelling-house of the person with whom or under whose care such defendant was at the time of serving such writ of summons, and also (in the case of such defendant being an infant not residing with or under the care of his father or guardian) served upon or left at the dwelling-house of the father or guardian, if any, of the infant, unless the Court or judge at the time of hearing such application shall dispense with such last-mentioned service (Order 13, r. 1, taken from C. O., vii. r. 3).

The procedure under this rule applies to the case of an originating summons (*In re Pepper*, *Pepper* v. *Pepper*, 1884, 32 W. R. 765). In *In re Dawson*, *Johnstone* v. *Hill*, 1889, 41 Ch. D. 415, Chitty, J., applied it to the case of an ordinary summons for the determination of a question between co-defendants.

The practice prescribed by the rule must be followed even though the infant and his guardian are out of the jurisdiction (*O'Brien* v. *Maitland*, 1862, 4 De G., F. & J. 331; *White* v. *Ducernay*, [1891] Prob. 290). It is very usual to appoint the official solicitor guardian upon an application under this rule. As to his costs, see Order 65, r. 13.

Proceedings in Chambers.—At any time during proceedings in Chambers in the Chancery Division under any judgment or order, the judge may, if he think fit, request a guardian *ad litem* to be appointed for any infant who has been served with notice of the judgment or order (Order 55, r. 27).

Who may be appointed Guardian ad litem.—A co-defendent having no interest adverse to that of the infant may be appointed (*Anon.*, 1852, 9 Hare, App. xxvii); but not the plaintiff; nor a married woman (*In re Duke of Somerset*, *Thynne* v. *St. Maur*, 1887, 34 Ch. D. 465); nor a person out of the jurisdiction (*Anon.*, 1854, 18 Jur. 770). It is desirable, if possible, that he should be a relation, connection, or friend (*Foster* v. *Cautley*, 1853, 10 Hare, App. xxiv).

Consent on behalf of Infants.—The guardian *ad litem* can consent on behalf of the infant in any matter of procedure (*Knatchbull* v. *Fowle*, 1876, 1 Ch. D. 604; *Fryer* v. *Wiseman*, 1876, 24 W. R. 205; and see Order 16, r. 21). This includes the power to compromise (*Leeming* v. *Murray*, 1880, 28 W. R. 338), but not where the agreement is of no benefit to the infant (*Rhodes* v. *Swithenbank*, 1889, 22 Q. B. D. 577). The Court has no jurisdiction to enforce a compromise against the wish of the guardian (*In re Birchall*, *Wilson* v. *Birchall*, 1880, 16 Ch. D. 41).

Discovery.—A guardian *ad litem* can be compelled to answer interrogatories, or to file an affidavit of documents (Order 31, r. 29).

Costs.—A guardian *ad litem* is not ordinarily liable for costs of suit, except in cases of misconduct (*Morgan* v. *Morgan*, 1865, 11 Jur. N. S. 233).

Persons of Unsound Mind, In case of.—A defendant of unsound mind not so found by inquisition, defends an action brought against him by a guardian appointed for that purpose (Order 16, r. 17). The position of such guardian is precisely the same as in the case of an infant. The practice, too, as stated above with regard to infant defendants, is precisely

similar in case of a defendant who is *non compos mentis*, with the following exceptions: After service of the writ of summons, the proper course is for an appearance to be entered, and then an order of Court obtained appointing a guardian *ad litem* (Daniell's *Ch. Pr.* p. 182). Whether discovery can be obtained from the guardian *ad litem* of a person of unsound mind, *quære*. Order 31, r. 29, applies only to the case of infants.

Where a solicitor of the Court had been appointed guardian to a defendant of unsound mind, and the defendant recovered pending suit, but delayed applying for discharge of the guardian, he was ordered to pay the costs of the guardian with liberty to add them to his own (*Frampton* v. *Webb*, 1863, 11 W. R. 1018).

[*Authorities.*—Chitty's *Arch.*, 14th ed., pp. 1137–1140, 1144–1146; Daniell's *Ch. Pr.*, 5th ed., pp. 172–185; Daniell's *Forms*, 4th ed., pp. 45–52, 54–60; Seton, 5th ed., pp. 826, 827; Simpson on *Infants*, 2nd ed., pp. 486–500; Pope on *Lunacy*, 2nd ed., pp. 330–338; Wood Renton on *Lunacy*, 1896, pp. 1012, 1013.]

Guardianship.—See Infants.

Guardians of the Poor.

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I. Constitution of a Board of Guardians.

For the better administration of the poor law, the whole of England and Wales is divided into 649 districts of varying size and population, called unions. In each union there is a body, called a Board of Guardians, which administers the poor law in that district. The statutory definition of a "poor law union" is, in fact, "any parish or union of parishes for which there is a separate Board of Guardians" (52 & 53 Vict. c. 63, s. 16).

Both unions and Boards of Guardians were unknown to the common law; they are entirely the creatures of statute. The present poor-law system may be said to have commenced in 1601; and as early as 1662 we find parishes combining for poor-law purposes under special Acts of Parliament. By a permissive statute passed in 1782 (22 Geo. III. c. 83, commonly known as Gilbert's Act) parishes were allowed to combine for purposes of indoor relief. But the present scheme of organised unions was created by the Poor Law Amendment Act, 1834 (4 & 5 Will. IV. c. 76). By that Act the relief of the poor was taken out of the hands of the vestries, and trans-

ferred to Boards of Guardians. Guardians of the poor had been introduced by Gilbert's Act; but the Board of Guardians dates from 1834. By the Act of 1834 a body of commissioners was appointed, to whom was intrusted the duty of grouping the existing parishes into unions. These commissioners subsequently became the Poor Law Board, which in 1871 was merged in the Local Government Board. They went on the principle of taking a market town as a convenient centre and uniting all surrounding parishes within easy reach of it into a union. In some cases an existing workhouse was taken as the centre; and other local circumstances were permitted to modify the general plan. But no regard was paid to the boundaries of counties. No less than 181 of the unions then created were intersected by county boundaries. But this has been gradually put right by the Local Government Board, which has full power to create new unions and to dissolve existing ones or alter their boundaries. Parishes may be transferred from one union to another; a single parish or township in which the population has largely increased may be raised to the rank of a union (4 & 5 Will. IV. c. 76, s. 39). But in spite of all these powers the number of unions in England and Wales has remained practically stationary; it was 647 in 1877, 648 in 1892, and is now 649.

Every Board of Guardians is a body corporate, called by the name of "The Guardians of the Poor of the —— Union" (*or* "of the parish of ——") "in the county of ——." It has perpetual succession and a common seal, and may sue and be sued, and take and hold land in that name, without licence in mortmain (5 & 6 Will. IV. c. 69, s. 7). In any action or indictment relating to any property belonging to the Board, it is sufficient to lay the property in the Board of Guardians by that name (5 & 6 Vict. c. 57, s. 16).

II. Election of Members.

Ordinary Members.—All guardians now are elected. There are no longer any *ex officio* or nominated guardians (Local Government Act, 1894, 56 & 57 Vict. c. 73, s. 20 (1)). The bulk of the members are elected by the parishes. The number of guardians representing each parish is fixed by the Order creating the union. But the Local Government Board (4 & 5 Will. IV. c. 76, s. 38) and now the County Council (L. G. Act, 1894, s. 60) has power, by order, to alter the number. As a rule, every parish which has a population of not less than 300 sends at least one representative to the union; parishes with less population than 300 are joined to some neighbouring parish for the purpose (31 & 32 Vict. c. 122, s. 6). The Local Government Board (and now the County Council) may also divide any large parish into wards, and fix the number of guardians to be elected by each ward (39 & 40 Vict. c. 61, s. 12; L. G. Act, 1894, s. 60). The electors are the "parochial electors" of each parish (or ward) as defined by secs. 2 and 44 of the L. G. Act, 1894. The voting is by ballot. Each elector may give one vote and no more for each of any number of candidates not exceeding the number to be elected (s. 2, subs. (2)). The election must be conducted in accordance with rules laid down by the Local Government Board in an Order dated September 20, 1894. The provisions of the Ballot Act, 1872, of the Municipal Corporations Act, 1882 (ss. 74, 75), and of the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, apply to an election of guardians of the poor. Should any corrupt or illegal practice take place at such an election, a petition must be presented in proper time to the Local Government Board; the newly-elected Board of Guardians has no jurisdiction over the matter (*Hebditch* v. *MacIlwaine and Others*, [1894] 2 Q. B. 54).

Rural District Councillors.—But here note a distinction between rural and urban parishes. Guardians, as such, are not now elected for any parish in a rural district (L. G. Act, 1894, s. 24 (3)). All members of the rural district council are also necessarily poor law guardians; they represent each his own parish on the Board of Guardians for the union, without any separate election thereto; and this although the rural district council and the Board of Guardians are entirely distinct bodies. But in an urban district the Board of Guardians and the district council are still elected separately, and may consist of entirely different persons.

Additional Guardians.—The Board when constituted may add to its number not more than two persons from outside its own body, who are qualified to be guardians of that union; and any person so elected shall be an additional guardian, and a member of the Board. So, too, the Board when constituted may elect a chairman or vice-chairman from outside its own body, provided he be qualified to be a guardian of that union; and such chairman or vice-chairman shall also be an additional guardian and a member of the Board (L. G. Act, 1894, s. 20 (7)). Such additional guardians are not, however, district councillors even in a rural district; they merely attend when poor-law business is taken; and so do the representatives of parishes which, though comprised in the union, are not within the rural district.

Qualification.—A woman, even a married woman, may be a guardian. No property qualification is now required. No person is qualified to be elected a guardian unless he or she is a parochial elector of some parish within the union, or has resided in the union during the whole of the twelve months preceding the election, or in the case of a guardian for a parish wholly or in part within the area of a borough (whether a county borough or not) is qualified to be a councillor for that borough (L. G. Act, 1894, s. 23).

Disqualifications.—A person is disqualified from being, or being elected, a member or chairman of a Board of Guardians, if he—

(i.) is an infant or an alien; or

(ii.) has within twelve months before his election, or since his election, received union or parochial relief; or

(iii.) has, within five years before his election, or since his election, been convicted either on indictment or summarily of any crime, and sentenced to imprisonment with hard labour without the option of a fine, or to any greater punishment, and has not received a free pardon; or

(iv.) has, within five years before his election, or since his election, been adjudged bankrupt, or made a composition or arrangement with his creditors (but this disqualification ceases in case of bankruptcy, when the adjudication is annulled, or when he obtains his discharge with a certificate that his bankruptcy was caused by misfortune without any misconduct on his part, and, in case of composition or arrangement, on payment of his debts in full; and see *Aslatt* v. *Corporation of Southampton*, 1880, 16 Ch. D. 143; *R.* v. *Cooban*, 1886, 18 Q. B. D. 269); or

(v.) holds any paid office under the Board of Guardians to which he seeks to be elected; or is the paid poor-law officer of a union or parish in England or Wales, wherever situated (5 & 6 Vict. c. 57, s. 14); or

(vi.) is concerned in any bargain or contract entered into with the Board, or participates in the profit of any such bargain or contract or of any work done under the authority of the Board (see *Nutton* v. *Wilson*, 1889, 22 Q. B. D. 744; *Cox* v. *Ambrose*, 1890, 60 L. J. Q. B. 114; *Nell* v. *Longbottom*, [1894] 1 Q. B. 767). He will not, however, be disqualified merely because he is interested—

(*a*) in the sale or lease of any lands or in any loan of money to the Board; or

(*b*) in any newspaper in which any advertisement relating to the affairs of the Board is inserted; or

(*c*) in any contract with the Board as a shareholder in any joint-stock company. But in this last case he may not vote at any meeting of the Board on any question in which such company is interested, though in the case of a water company or other company established for the carrying on of works of a like public nature, this prohibition may be dispensed with by the County Council.

If any disqualified person votes or acts as a guardian, he will for each offence be liable to a fine not exceeding £20, recoverable before justices in the manner provided by the Summary Jurisdiction Acts (L. G. Act, 1894, s. 46).

Term of Office.—A guardian holds office for a term of three years. As a rule, one-third, as nearly as may be, of the members of every Board go out of office on 15th April in each year in a rotation determined by the County Council, and new members are elected to fill their places (L. G. Act, 1894, s. 20 (6)); though in some districts, by special order of the Local Government Board or of the County Council, the whole body retires *en bloc* in every third year, instead of one-third portion retiring each year. If, after election, a candidate refuses to serve on the Board, or if, after serving awhile, he resigns, he is liable to pay a fine, which is usually fixed at £20. But such fine will not be exacted if he was elected without his consent, or if he can satisfy the Local Government Board that he has good reason for resigning office, such as illness or necessary absence from the district (5 & 6 Vict. c. 57, s. 11). Any guardian who is absent from all meetings of the Board for more than six months consecutively, except because of illness or for some other good reason approved by the Board, thereby vacates his seat; and the Board, after calling upon him for an explanation of his absence (*Richardson* v. *Methley School Board*, [1893] 3 Ch. 510), may proceed to declare his seat vacant, with a view to the election of a successor (L. G. Act, 1894, s. 46). If the same person be elected guardian for more parishes than one, he must choose in which parish he will serve: he cannot serve in more than one. If he accepts office in one, or pays a fine in one, he cannot be fined for not accepting office in any other parish.

Declaration.—No person elected as guardian may act in the office (except in administering the declaration) until he has made and subscribed a declaration accepting office. This declaration must be made within one month after the guardian has notice that he has been elected; it must be made in the prescribed form, or in a form to the like effect: it must be subscribed before two guardians of the union, or before the clerk. It may be made at a meeting of the Board of Guardians, but this is not necessary. The form will be found in the Fourth Schedule to the Election Order of September 20, 1894, above mentioned. If a person acts as guardian without having made the declaration, he will for each offence be liable to a fine not exceeding £20. A failure to accept office within the prescribed time creates a casual vacancy, which will be filled up in the manner indicated by secs. 40 and 66 of the Municipal Corporations Act, 1882.

III. Meetings and Proceedings.

Time and Place of Meeting.—It is the duty of the guardians to hold an annual meeting as soon as they conveniently can after the 15th of April in each year. They must also hold other meetings for the transaction of their

business, once at least in each month, and at such other times as may be necessary for properly executing their powers. They commonly meet fortnightly.

They may from time to time make rules with respect to the summoning, notice, place, management, and adjournment of their meetings, and generally with respect to the transaction and management of their business. But no meeting of a Board of Guardians may be held in premises licensed for the sale of intoxicating liquor, except in cases where no other suitable room is available for the meeting either free of charge or at a reasonable cost (L. G. Act, 1894, s. 61).

Quorum.—No business shall be transacted at a meeting unless at least one-third of the full number of the guardians be present, subject to this qualification, that in no case shall a larger quorum than seven members be required (Schedule I. to the Public Health Act, 1875, extended to Boards of Guardians by sec. 59 of the L. G. Act, 1894).

Chairman and Vice-Chairman.—At every annual meeting the guardians must elect a chairman, and may elect one vice-chairman, to hold office until the next annual meeting. These officers may be elected either from amongst the guardians or from outside, as we have seen, *ante*, p. 116. If the chairman so appointed dies, resigns, or becomes incapable of acting, another member must be appointed chairman. He will hold office for the period during which his predecessor would have been entitled to continue in office, and no longer. If the chairman be present at the time appointed for holding the meeting, he takes the chair as of right; if he be not, the vice-chairman; if neither be present, the meeting appoints one of their number to act as chairman of that meeting. The vice-chairman in the absence of the chairman has the power and authority of the chairman (L. G. Act, 1894, s. 59 (2)).

Committees.—At each annual meeting the guardians also appoint their usual committees, which hold office until the next annual meeting. Of these the most important, perhaps, is the Assessment Committee, which must consist of "not less than six nor more than twelve" members (25 & 26 Vict. c. 103, s. 2). Each such committee may meet and adjourn as it thinks proper. Its quorum may be fixed by the Board when it appoints the committee; if not, three will be a quorum; except that in the case of the assessment committee the quorum must never be less than one-third of the whole number of the committee (s. 9). A committee may appoint a chairman to preside whenever he is present; but if no chairman be thus appointed or if he be not present at the time appointed for holding any meeting, the members present must choose one of their number to be chairman of such meeting.

Votes.—At every meeting of a Board of Guardians or any committee thereof every question is decided by a majority of the members present and voting on that question. If the votes be equal, the chairman has a second or casting vote. The names of the members present at any meeting of the Board, and of those who vote on each question, must be recorded, so as to show whether each vote given was for or against the question; but this is not necessary with votes given at a committee. The proceedings of any Board of Guardians or of any committee will not be invalidated by any vacancy among its members, or by any defect in the election of the Board, or in the election or qualification of any member of it.

Minutes.—Any minute made of the proceedings of any meeting of the Board, or of any committee of it, and copies of any orders made or resolutions passed at any such meeting, if purporting to be signed by

the chairman of that or of the next ensuing meeting, shall be received as evidence in all legal proceedings; and, until the contrary is proved, every meeting where minutes of the proceedings have been so made shall be deemed to have been duly convened and held, and all the proceedings thereat to have been duly had. Such a minute-book will, in a proper case, be ordered to be deposited in Court for inspection, although it may be in constant use by the Board (*A.-G.* v. *Whitwood Local Board*, 1871, 40 L. J. Ch. 592. And see Schedule I. to the Public Health Act, 1875).

IV. Duties of Guardians.

1. *Relief of the Poor.*—The first duty of a Board of Guardians is to relieve the poor; to administer the large funds compulsorily raised for this charitable object by means of the poor-rate. This involves the anxious consideration of problems as to indoor and outdoor relief, the "boarding out" of children, etc., the discussion of which is beyond the scope of this article. Every union has its workhouse, or a share in a workhouse, in which the "impotent poor" and pauper children are housed, clothed, and fed; and the casual poor temporarily relieved. The overseers of a parish cannot now give relief, except in cases of urgent necessity, and then only temporarily. The guardians, too, must see that the inmates of the workhouse do their taskwork, and observe the rules of the house; and they must also, so far as possible, provide work for every able-bodied male person who is in receipt of outdoor relief. No one can demand outdoor relief as a right; but, if in need, he can insist on being received into the workhouse of the union in which he is, until he is shown to be "settled" in some other union; see Poor Law. The master of any workhouse must also receive into the workhouse any child brought there under any order made in pursuance of the Infant Life Protection Act, 1897; and such child must be maintained in the workhouse until otherwise disposed of (60 & 61 Vict. c. 57, s. 7).

2. *Officers.*—In order to distribute relief, to manage the workhouses, schools, and other institutions, and to provide food, clothes, etc., for the paupers, the services of many officers are required, to whom various duties are assigned. Thus it is the duty of the guardians from time to time to appoint fit persons to hold the undermentioned offices, and to see that, when they have been appointed, they discharge their duties efficiently and thoroughly:—

(1) Clerk to the guardians.
(2) Treasurer of the union.
(3) Chaplain.
(4) Medical officer for the workhouse.
(5) District medical officer.
(6) Master of the workhouse.
(7) Matron of the workhouse, who is generally the wife of the master.
(8) Schoolmaster.
(9) Schoolmistress.
(10) Porter.
(11) Nurse (in some cases also a district nurse).
(12) Relieving officer.
(13) Superintendent of outdoor labour; and such collectors, clerks, and other assistants as the guardians, with the consent of the Local Government Board, may deem necessary.

But though the guardians have the right to appoint these officers, each appointment (except in the case of menial servants) must be confirmed by the Local Government Board. And, once appointed, the officer of a union

cannot be dismissed—though he may be suspended—by the guardians; he can only be dismissed by the Local Government Board. This makes the officers independent of the guardians to an extent which is often embarrassing, and sometimes mischievous. And the Local Government Board has the power, though it seldom if ever exercises it, to dismiss an officer of the union whom the guardians wish to retain.

3. *Poor-rate.*—In order to grant the necessary relief, to maintain all the buildings and institutions of the union, and to provide salaries for these various officers, a large sum, amounting in all to considerably over £8,000,000 per annum, is raised by means of the poor-rate. The collection of this rate is primarily the business of the officers of each parish—the overseers of the poor (see PARISH)—and not of the guardians, who, in the first instance, merely make an order that each constituent parish in the union shall contribute a certain sum. Formerly each parish paid only for its own poor. A parish in which none of the paupers in the union workhouse at a given moment were settled, paid no poor-rate. But this was altered by the Union Chargeability Act, 1865 (28 & 29 Vict. c. 79); and now each parish in a union contributes half-yearly towards the expenses incurred by the guardians a sum which is in proportion to the rateable value of all the property in that parish. The guardians strictly are only concerned in the total rateable value of each constituent parish; but incidentally they have a voice in determining the rateable value of each separate holding. The first step in the process of making a rate is for the overseers of the parish to prepare a full list of all the rateable property in their parish, stating what they deem to be the rateable value of each holding. This "valuation list," as it is called, is open to the inspection of any ratepayer for fourteen days at the Poor Law Offices of the union (25 & 26 Vict. c. 103, s. 17). It then comes before the assessment committee of the Board of Guardians (see *ante*, p. 118). It is the duty of this committee to revise this list, to see that no rateable property is omitted, that the valuation is correctly and equitably made, and that no occupier is compelled to pay more than his fair share of the common burden. It therefore hears and adjudicates on all complaints and objections which are brought before it, deciding questions both of liability and amount. The committee may, if it thinks fit, employ a valuer to revise the valuation, or to make out a new valuation list; but before incurring this expense it must obtain the consent of the full Board of Guardians after notice given to every guardian (s. 16). The valuation list, thus checked and corrected, is returned to the overseers; a copy must be kept in the board-room, or other convenient place in the union, open to the inspection of any ratepayer (25 & 26 Vict. c. 103, s. 31). Another copy must be sent to the clerk of the peace for the county. Any ratepayer may appeal from the decision of the assessment committee to Quarter Sessions. If he succeeds in his appeal, the list will, of course, be amended by the Court; the costs incurred by the assessment committee as respondents in such an appeal are charged to the common fund of the union (27 & 28 Vict. c. 39, s. 3; *Manchester, Sheffield, and Lincolnshire Ry. Co.* v. *Guardians of the Poor of Doncaster Union*, [1897] 1 Q. B. 117). On the valuation list, as thus finally settled, the overseers proceed to make the rate; they know the amount required from their parish; they know the total rateable value of all the tenements in their parish; they can easily see how much in the pound will bring in the amount required; and they thus assess the sum which each occupier must pay. The rate so made by the overseers must first be allowed by the justices. Public notice is then given that the rate is made; and if no appeal is raised, the overseers proceed to collect the

amount, and pay over to the treasurer of the union the proportion of it to which he is entitled.

4. *Loans.*—The guardians must always be careful to demand from their constituent parishes an amount sufficient to defray their current expenditure; for the Board has no power to anticipate its income, or to borrow money on the security of the rates, or to pay interest on borrowed money. They can only borrow money for the purpose of paying for some permanent work or object, such as the erection of a new workhouse, hospital, or asylum, the benefit of which will last, and the cost of which may therefore fairly be spread over a term of years. But even in this case no such loan can be raised without the consent of the Local Government Board, which will, as a rule, be refused if the amount proposed to be expended will bring the total debt of the guardians over one-fourth of the total rateable value of the union, though in special cases and for special reasons the Local Government Board may allow this maximum to be exceeded (Poor Law Act, 1889 (52 & 53 Vict. c. 56), s. 2: and now see the Poor Law Act, 1897, 60 & 61 Vict. c. 29).

5. *School Attendance Committee.*—In rural districts, where there is no School Board the School Attendance Committee is a committee of the guardians. The Board must annually appoint not more than twelve nor less than six of their members to serve on this committee (39 & 40 Vict. c. 79, s. 7). It is the duty of this committee to enforce the provisions of the Elementary Education Acts as to the employment of children and their attendance at school. See SCHOOL BOARD. In every union, moreover, the guardians must see that the children of their paupers are properly educated.

6. *Vaccination.*—It is also the duty of the Board of Guardians—sometimes an unpleasant one—to enforce the Vaccination Acts, 1861 and 1871, within their union. For this purpose they must appoint and pay at least one vaccination officer for each district. As a rule, each union is a separate vaccination district, though some of the larger unions are subdivided into two or more vaccination districts. Grants will be made by the County Council to the Board of Guardians from time to time to recoup the Board for all payments made by it to public vaccinators under sec. 5 of the Vaccination Act, 1867. See VACCINATION.

7. *Registration of Births and Deaths.*—It is the duty of the guardians to appoint and pay the registrars of births and deaths, and to see that they are provided with suitable offices. The guardians appoint one superintendent registrar for the whole union, who is generally their clerk, and several registrars, one for each sub-district in their union. But though appointed by the union, they may be dismissed by the Registrar-General. The Registrar-General may also unite two or more unions to form one superintendent registrar's district (37 & 38 Vict. c. 88, ss. 21, 22).

8. *Other miscellaneous duties* are imposed on a Board of Guardians by various statutes. Thus in all places outside the metropolis the Board of Guardians is "the local authority" whose duty it is to enforce the Infant Life Protection Act, 1897, which comes into operation on January 1, 1898. But note that the powers conferred on a Board of Guardians by sec. 3 of the Union and Parish Property Act, 1835 (5 & 6 Will. IV. c. 69), enabling it, with the approval of the Local Government Board, to sell, exchange, or let the property of any parish within its union, are now transferred to the Parish Council by sec. 6 (1) (*d*) of the Local Government Act, 1894, in the case of any rural parish in which there is a Parish Council.

V. Central Control.

The control of the Local Government Board over all Boards of Guardians is very strict and thorough. Such Boards and their unions were practically created, as we have seen, by the Poor Law Commissioners; and the Local Government Board, which is the successor of those Commissioners, has always taken a most paternal interest in the proceedings of all guardians. It advises any Board that is in doubt or difficulty; it arbitrates between various Boards, or between a Board and its officers; it may create new unions, alter the constituent parishes of existing unions, and dissolve unions. Under sec. 8 of the Poor Law Act, 1879 (42 & 43 Vict. c. 54), it may, with the consent of the guardians, combine unions for any purpose or purposes connected with the administration of the poor law. No union officer can be appointed by the guardians (except in the case of menial servants) without the sanction of the Local Government Board, and the officers, when appointed, may be removed by the Board without consulting the guardians. Lists of all pauper lunatics must be sent to the Local Government Board on or before the 1st of February in each year (Rules of the Commissioners in Lunacy, 1895, r. 333). Every Board of Guardians must also report the proceedings of its assessment committee to the Local Government Board in the month of April in each year (25 & 26 Vict. c. 103, s. 12). In no other department of local government is the central control so complete and so efficient as in the case of Boards of Guardians.

Audit.—In particular, the Local Government Board subjects the accounts of all Boards of Guardians to a half-yearly audit of a most thorough and searching character. The auditor (who is an officer appointed by the Local Government Board) gives the officers of each parish in the union fourteen days' notice of the day on which he proposes to hold the audit. The rate-books and other accounts must then be made up and balanced forthwith, and deposited seven clear days at least before the day fixed for the audit, at some convenient place within each parish, where they can be inspected on any of the seven intervening days between 11 a.m. and 3 p.m., by any person liable to be rated to the relief of the poor in that parish. Due notice must be given forthwith in each parish, and advertised in at least one local newspaper, of the time and place fixed for the audit, and of the place where the parish books are deposited (7 & 8 Vict. c. 101, s. 33; 11 & 12 Vict. c. 91, s. 7). Any parish officer refusing to allow any ratepayer in the parish to inspect the books will be liable to a fine of forty shillings. Every ratepayer in any parish of the union is entitled to be present at the audit, and may raise any objection to any such accounts before the auditor. The auditor can compel the attendance at the audit of every person who holds any book, deed, paper, goods, or chattel relating to the poor-rate or to the relief of the poor, and also of every person accountable to the union for any money, and can call on any such person to produce all accounts and vouchers, and also to make and sign a declaration with respect to such accounts (7 & 8 Vict. c. 101, s. 33).

Surcharge.—It is the duty of the Local Government Board auditor to disallow every item of expenditure which is in his opinion improper (and therefore illegal), and to "reduce all such payments and charges as are exorbitant" (L.G.B. Orders of February 17, 1858, article 32, and of January 14, 1867, article 41). In addition it is his duty to charge against any person accounting—

(1) The amount of any deficiency or loss incurred by the negligence or misconduct of such person; and also

(2) The amount of any sum for which such person is accountable, but which he has not brought into account against himself (7 & 8 Vict. c. 101, s. 32).

The guardians are intrusted with the control and distribution of the poor's fund; there are certain specific purposes for which alone this fund can be employed; the guardians must be taken to know the law; and if they allow the moneys in their hands to be devoted to any unauthorised purpose, they betray the trust reposed in them (*A.-G.* v. *Compton*, 1842, 1 Y. & C. C. 417, 429). Hence, strictly, every guardian who voted in favour of the resolution directing the illegal payment is liable to be surcharged under sec. 32 above (see also s. 5 of the 11 & 12 Vict. c. 91). But the usual course is for the auditor only to surcharge those guardians who actually signed the cheque or the order to the treasurer of the union. The persons surcharged must pay the amount to the treasurer within seven days (7 & 8 Vict. c. 101, s. 32).

Any guardian who is surcharged can require the auditor to state his reasons for the surcharge in writing in the book of account in which he enters the surcharge. He may then (*a*) appeal from the auditor to the Local Government Board, who will decide whether the auditor acted legally or not in making the surcharge (7 & 8 Vict. c. 101, s. 36). Or (*b*) he may admit his error, and apply, under 11 & 12 Vict. c. 91, s. 4, to the Local Government Board to exercise its equitable powers in his behalf and relieve him from making the payment. The amount will generally be remitted, if the mistake was made in good faith. Or (*c*) he may apply to the High Court for a *certiorari* to bring up the order of the auditor to be quashed, as was done in the case of *R.* v. *Cumberlege*, 1877, 2 Q. B. D. 366. On such an application the Divisional Court, as a rule, will refuse to interfere with the discretion of the auditor on any matter of detail, or on any question of amount, and will only reverse his decision if it is clear that he has gone wrong on some matter of principle (*ibid.* and see *Ex parte The Overseers of Spotland*, 1860, 2 L. T. N. S. 214; *R.* v. *Knott*, 1866, 15 L. T. N. S. 291).

As to pauper lunatics, see ASYLUMS, vol. i. pp. 373–376.

Guernsey.—See CHANNEL ISLANDS.

Guerrilla (sometimes spelt *Guerilla*), diminutive of the Spanish word *guerra*, is war carried on in an irregular manner. It is generally applied to the persons or bands carrying on the irregular warfare. The position of irregular combatants has long been one of difficulty. Vattel observes that if two nations are engaged in war, and all the subjects of the one may commit hostilities against those of the other, the war could hardly be terminated otherwise than by the utter extinction of one of the parties. "It is therefore with good reason that the contrary practice has grown into a custom with the nations of Europe, at least with those that keep up regular standing armies or bodies of militia. The troops alone carry on the war while the rest of the nation remain in peace. And the necessity of a special order to act is so thoroughly established that even after a declaration of war between two nations, if the peasants themselves commit any hostilities, the enemy shows them no mercy but hangs them up as he would so many robbers and banditti" (*Law of Nations*, iii. s. 226).

At the International Conference at Brussels in 1874, after some contro-

versy, it was agreed that guerrillas, *franc-tireurs*, and other irregulars should be entitled to the rights of war, provided the following conditions were complied with :—(*a*) That they should have at their head a person responsible for his subordinates ; (*b*) that they wear some settled distinctive badge, recognisable at a distance ; (*c*) that they carry arms openly ; and (*d*) that they conform in their operations to the laws and customs of war.

In the Instructions for the Government of Armies of the United States in the Field of 1863 more rigorous requirements were imposed. "Men or squads of men," they say, "who commit hostilities whether by fighting or inroads for destruction or plunder, or by raids of any kind, without commission, without being part and portion of the organised hostile army, and without sharing continuously in the war, but who do so with intermitting returns to their homes and avocations, or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character or appearance of soldiers—such men or squads of men are not public enemies, and therefore, if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates."

The Brussels Code is not binding on States, but it will doubtless be followed in future wars. Russia, in the war of 1877–78, issued it, and the Convention of Geneva of 1864 (see GENEVA CONVENTION) and the Declaration of St. Petersburg of 1868, as a manual in question and answer form for the use of the Russian troops in the field.

Guidon de la Mer—A French treatise in code form of merchant shipping law in twenty chapters by an unknown author. The first known edition is dated 1607, the second 1645, but it is supposed to have been drawn up between 1556 and 1584. The influence of the Guidon spread from the western coast over the whole of maritime France, and many of its solutions of points of difficulty were incorporated in the famous *Ordonnance* of 1681, and thus passed into the maritime legislation and jurisprudence of other nations. The subject chiefly treated is the contract of insurance, but most other shipping engagements are also dealt with.

[*Authorities.*—Pardessus, *Collection des lois maritimes antérieurs au 18e siècle*, Paris, 1829–45, vol. ii.; Cleirac, *Us et Coutumes de la Mer*, Bordeaux, 1661; Kaltenborn, *Grundsätze des practischen europæischen Seerechts*, Berlin, 1851, vol. i. p. 26.]

Guild.—See COMPANIES, CITY.

Guildhall.—See LONDON (CITY); INFERIOR COURTS, *Norwich.*

Guildhall Sittings.—The old sittings of the common law Courts for trial of causes with juries at the Guildhall of the City of London were discontinued for a time, on the transfer of the Supreme Court to the Royal Courts of Justice. Provision was made for their resumption (54 & 55 Vict. c. 14), but after a short experience the experiment was abandoned, and London causes are now tried at the Royal Courts. The special rules as to London causes are contained in Order 36, rr. 29 *a*, 29 *b*; *Ann. Pract.*, 1898, p. 698.

Guilty Mind; Guilty Knowledge; Guilty Intent.—In the earlier history of crime at common law little or no regard was paid to the intention or state of knowledge of the person who did the act, as a constituent or essential element of crime. If a man was killed, *wite* and *wer* must be paid, whether the killing were deliberate or accidental. And it is said that arson is the first offence at common law in which the intent was regarded as essential (see ARSON). Even now it is usual to lay down the rule that every killing is *primâ facie* murder (Steph. *Dig. Cr. Law*, 5th ed., p. 191; and see MURDER).

But at an early stage, when crimes became pleas of the Crown and sources of revenue to the Exchequer, there arose in the interest of the accused, besides the right to trial *in pais*, a maxim probably derived from ecclesiastical conceptions of sin, *actus non facit reum, nisi mens sit rea*, of the essence of which the phrases "guilty mind" and "guilty intent" are a transcript.

Its first important effect was in creating the exceptions from liability for criminal acts in the case of children of tender years (though this may perhaps be traced to the fact that boys were not sworn to the law until they were fourteen); of insane persons who, by reason of mental affliction, were incapable of understanding the nature and quality of the act or omission imputed to them. Such persons were not *doli capaces* in law, and not of mental capacity sufficient for criminal responsibility.

It also applied where the accused was under such duress, coercion, or restraint as not to be a voluntary agent in doing an act which, if voluntarily done, would be criminal, *e.g.* a wife under marital coercion. See COERCION.

It further applied to cases where the act was voluntarily done, but under a reasonable though mistaken belief in the existence of facts which, if true, would have justified or excused the act charged as criminal.

Thus a *bonâ fide* claim of right to do the act charged as criminal in most cases excludes the jurisdiction of justices on a charge of petty misdemeanour if the right is one which can exist in law. But this plea has been held ineffectual in proceedings for game trespass (*Watkins* v. *Major*, 1875, L. R. 10 C. P. 665), and is necessarily so in any proceedings for obstructing a highway, where the question for the justices to settle is "highway, or no highway." But even in proceedings by indictment, *bonâ fide* claim of right may amount to a defence where its existence is incompatible with some of the essential mental constituents of the offence.

The *bona fides* of the claim is, of course, a question of fact for the Court in which it is set up as a defence (*Reece* v. *Miller*, 1882, 8 Q. B. D. 626), but an inferior Court cannot acquire jurisdiction by a wrong finding of fact (*R.* v. *Farmer*, [1892] 1 Q. B. D. 637).

The defence only applies where some intent or mental condition is an element of the offence charged (*Watkins* v. *Major*, *ubi supra*). It includes *bonâ fide* claim of title to land or other property where an act is done thereunder, and the claim of right or title must not only be believed in honestly, even if erroneously, but must be such as can legally exist (*Simpson* v. *Wells*, 1872, L. R. 7 Q. B. 214; *Pearce* v. *Scotcher*, 1882, 9 Q. B. D. 162). Before a Court of summary jurisdiction the existence of a *bonâ fide* claim merely ousts jurisdiction to try the charge. In higher Courts it may be a complete answer or excuse, *e.g.* where a man charged with theft of an umbrella at his club can prove that he took it in honest mistake for his own (*R.* v. *Cridland*, 1857, 27 L. J. M. C. 28. See Maxwell on *Statutes*, 3rd ed., 136–138).

In another way this defence had a still more important and far-reaching effect. There is a singular absence in the statute-book of a complete definition of any serious crime. The elements unlawfully, "fraudulently," "knowingly," "maliciously" or "negligently," are included, in many cases, in the definition; but "it is the general, almost the invariable, practice of the Legislature to leave unexpressed some of the mental elements of crime, the full definition of which contains expressly or by implication some propositions as to a state of mind."

This view of the criminal law is most fully discussed by the judges in *R.* v. *Tolson*, 1889, 23 Q. B. D. 168, in which the divergent views of the matter are most fully stated. The view of the majority is that honest and reasonable mistake is on the same footing as absence of reasoning faculty, as in infancy, or its perversion, as in lunacy (Cave, J., p. 182), and applies as defence or excuse to statutory or to common law offences which expressly or implicitly contain as a constituent element any necessity of proving a state of mind or of knowledge (Stephen, J., 185).

In the case of some serious crimes it is unnecessary to prove guilty knowledge, *e.g.* in the case of offences against girls or boys under a certain age, where the defence of consent, or ignorance of the child's age, or belief that it was greater, is absolutely excluded, or, if admitted at all, is so only when based on reasonable grounds. The purpose of these enactments is obviously an absolute prohibition of the acts in question, as immoral or mischievous to the nation. See *R.* v. *Prince*, 1875, L. R. 2 C. C. R. 154, and sec. 4 of the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69).

And the offence of obtaining credit over £20 by an undischarged bankrupt without disclosure of his status does not involve the element of guilty mind so far as fraud is concerned (*R.* v. *Dyson*, [1894] 2 Q. B. 176).

There is a class of wrongful acts, such as nuisance and libel, whether blasphemous, defamatory, or obscene, in which the intentions of the publisher, however pure or laudable, will not avail him as a defence (*Steele* v. *Brannan*, 1872, L. R. 7 C. P. 261). In these cases the public scandal, injury, or damage is regarded as so grave and obvious as to override the considerations as to the particular private intent, or throw the burden of justification or excuse, if any, on to the accused; and in a very large class of petty misdemeanours, the definition of the offence not infrequently shows that the Legislature intended to prohibit absolutely certain acts, irrespective of the mind or knowledge of the agent (assuming him not to be a lunatic or infant). The cases are, to a very large extent, in the nature of public nuisances, as to which, even at common law, the intent is immaterial. Such are the laws as to selling food or drugs (*Blake* v. *Tillstone*, [1894] 1 Q. B. 345; *Dyke* v. *Gower*, [1892] 1 Q. B. 220).

But there are undoubtedly other cases in which the definition of the offence clearly excludes any question of guilty mind and prohibits the act absolutely. Those most, and most recently, discussed arose under the penalty clauses of the Licensing Act, 1872 (*Cundy* v. *Lecocq*, 1884, 13 Q. B. D. 210; *Somerset* v. *Wade*, [1894] 1 Q. B. 574; *Sherras* v. *de Rutzen*, [1895] 1 Q. B. 918; *Police Commissioners* v. *Eastman*, [1896] 1 Q. B. 655). These cases illustrate the necessity of narrowly scrutinising the scope and terms of each statute by itself or in the light of statutes or cases *in pari materiâ*, but afford no absolute rule nor safe guide, except perhaps a presumption against exclusion of the element of guilty mind (*R.* v. *Sleep*, 1861, L. & C. 44).

These rules have an important effect on the criminal liability of corporations. In 1827 (7 & 8 Geo. IV. c. 28, s. 14) it was found expedient to alter the common law presumption against such liability: but this change has not operated to create it in the case of treason felony, or even these misdemeanours which involve personal violence or some mental condition as distinct from a prohibited act such as libel (without *scienter*) or nuisance, and to limit the liability for the most part to petty misdemeanours (*Pharmaceutical Society* v. *Wheeldon*, 1880, 5 App. Cas. 857, 869; *R.* v. *Tyler*, [1891] 2 Q. B. 594).

[*Authorities.*—See further, Hardcastle on *Statutes*, 2nd ed., 481–488; Archbold, *Cr. Pl.*, 21st ed., 249, 496, 657.]

Guinea—A gold coin, whose name seems to have been derived from Spain, and was known in 1611 in England (Shaw on *Currency*, 135; Report of Sir W. Raleigh).

English guineas were first minted in 1660, and their issue continued till July 1, 1817, when sovereigns were put into circulation. They were intended to be the equivalent of a "pound sterling," but their value fluctuated, but was approximately 21s. (Shaw, pp. 231, 247). They continued current for some time after 1817 (see St. R. & O., Rev., vol. i. p. 603), but were decried in 1831. But computation in guineas is preserved for purposes of professional honoraria and voluntary subscriptions, notwithstanding secs. 5 and 6 of the Coinage Act, 1870 (33 & 34 Vict. c. 10). See Chalmers, *Colonial Currency*, 400; and COIN, BRITISH.

Gully.—See DRAINS; DRAINAGE; SEWER.

Gun.—See FIREARMS.

Barrel.—Provision is made for testing gun barrels at the Birmingham Proof House by 31 & 32 Vict. c. cxiii., and regulations made thereunder on December 27, 1887, and gazetted January 3, 1888, *L. G.* p. 16–26.

Cotton.—See EXPLOSIVES.

Licence.—See FIREARMS; GAME LAWS.

Powder.—See EXPLOSIVES. Special regulations also exist as to storage of gunpowder in dockyard ports (28 & 29 Vict. c. 125, s. 5), and as to the storage of gunpowder and other explosives on vessels in the Mersey. Those there in force were made on September 12, 1890 (St. R. & O., 1890, p. 709).

Gutters.—See DRAINS; DRAINAGE.

Gymnasiums.—Provision is made in the Baths and Washhouses Act, 1878, 41 Vict. c. 14, for the establishment of gymnasiums by urban authorities (s. 7), who have power to make charges for the use of such gymnasiums (s. 8). See BATHS AND WASHHOUSES; and also for the pro-

visions of the (*adoptive*) Museums and Gymnasiums Act, 1891, 54 & 55 Vict. c. 22, MUSEUMS AND GYMNASIUMS.

Gypsy.—The gypsies (whose origin is uncertain) are a population of a nomadic character dwelling in tents or caravans and scattered over Europe, Northern Asia, and America. In modern times they have shown an increased tendency to assimilate themselves with the populations among whom their lot is cast, but they still exist in most countries as a distinct body of people. In earlier Acts of Parliament they are described as Egyptians. The gypsies first appear in Europe in large numbers in the fifteenth century. They were certainly established in England in 1514, and the first Act dealing with them (22 Hen. VIII. c. 10) was passed in 1531. Although the Act is now repealed, its preamble is still of interest, as it states the chief reason why the law of civilised States is obliged to protect its subjects in some degree from the habits and practices of gypsies.

The preamble stated that "Forasmuch divers and many outlandish people calling themselves Egyptians, using no craft nor feat of merchandise, have come into this realm and gone from shire to shire and place to place in great company, and used great subtle and crafty means to deceive the people, bearing them in hand, that they by palmistry could tell men and women's fortunes, and so many times by craft and subtlety have deceived people of their money, and also have committed many heinous felonies, to the great hurt and deceit of the people that they have come among"; and the Act accordingly went on to provide that if any such persons should come within the realm, they should leave the same within fifteen days after command to do so under pain of imprisonment. The stringency of this Act was increased by the Statute 1 & 2 Ph. & Mary, c. 4, which inflicted a pecuniary penalty on persons bringing gypsies into the realm, and made gypsies continuing and remaining there against its provisions and those of the former Act, liable to be adjudged and to suffer death as felons. This Act was explained by a later Act, 5 Eliz. c. 20, which, describing the gypsies as the false and subtle company of vagabonds calling themselves Egyptians, declared that the Statute 1 & 2 Ph. & Mary should remain in force; but provided that no person born in the realm should thereunder be compelled to leave the realm, but only to leave "their naughty and ungodly life and company," and to live in some honest manner.

The effect of these Acts was to make the gypsies a proscribed class (Coke, *Inst.* 3102; see also note Stephen's *Com.* vol. iv. p. 246), and for a time the Acts were severely enforced against them; but they failed to effect their purpose, and had in the eighteenth century fallen into desuetude, gypsies being at that time only prosecuted under the Vagrant Act, 17 Geo. II. c. 5. The Act 5 Eliz. c. 20 was repealed by Geo. III. c. 51, and the severe penalty of death in the Act 1 Ph. & Mary, c. 4, was removed by 1 Geo. IV. c. 116.

New statutory provisions have, however, been made with regard to gypsies in modern times. The Vagrants Act, 5 Geo. IV. c. 83, an Act which repealed all former Vagrant Acts, enacts that a person telling fortunes shall be deemed a rogue and vagabond (as to this, further see article FORTUNE TELLING), and also every person wandering abroad and lodging in the open air, or under a tent, or in any cart or waggon, not having any visible means of subsistence, and not giving a good account of him or herself. The Act 5 & 6 Will. IV. c. 50, s. 72, imposes a penalty of forty shillings on any gypsy pitching any booth, tent, stall, or stand, or

encamping upon any part of the highway. The Acts 22 Hen. VIII. c. 10 and 1 & 2 Ph. & Mary, c. 4, were repealed with all enactments confirming them by the Act 19 & 20 Vict. c. 24. It is therefore the fact that gypsies are no longer a proscribed class, and it is arguable that a band of gypsies not engaged in fortune telling and practising some remunerative occupation, *e.g.* basket-making, may lawfully live in tents as long as they do not encamp on high roads. An injunction will, however, be granted to restrain the letting of land for the purposes of a gypsy encampment, when it can be shown that such an occupation of the land is dangerous to the health of the neighbourhood (*A.-G.* v. *Stone*, 1895, 60 J. P. 168); and under the Public Health (London) Act, 1891, s. 95, subs. (2), a local authority may make by-laws for promoting cleanliness in, and the habitable condition of, tents, vans, and sheds used for human habitation, and preventing the spread of infectious disease or nuisances connected with the same (see also subs. (3)). See also articles VAGRANT; FORTUNE TELLING.

[*Authorities.*—As to gypsies generally, see Hoyland, *History of Gypsies*; article "Gypsy" in *British Encyclopædia*, and the authorities there cited; Coke, *Institutes*; Hale, *Pleas of the Crown*; Black. *Com.*; Reeves, *Hist. Eng. Law.*]

Habeas Corpus.

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NATURE AND KINDS OF WRITS OF HABEAS CORPUS.—The ancient prerogative writ of *habeas corpus* takes its name from the two mandatory words *habeas, corpus*, which it contained at the time when it, in common with all forms of legal process, was framed in Latin.

There were at common law several kinds of writs which came under the general designation of writs of *habeas corpus*. The general purpose of these writs, as their name indicates, was to obtain the production of an individual. The writs were distinguished from one another by the Latin terms denoting the particular objects for which they were issued. Thus at common law, in addition to the celebrated writ of *habeas corpus ad subjiciendum*, there existed the writs of *habeas corpus ad respondendum, ad satisfaciendum, ad prose-*

quandum, ad testificandum, ad deliberandum, ad faciendum et recipiendum (frequently known as *habeas corpus cum causâ*) (see Black. *Com.* bk. iii. ch. viii.; Comyn's *Dig.* tit. *Habeas Corpus*; Bacon, *Abr.* tit. *Habeas Corpus*). Of these writs some are at the present day merely of antiquarian interest, their objects being attained in modern practice by other modes of procedure. Those which are still in use will be noticed at the end of this article.

The writ of *habeas corpus ad subjiciendum*, owing to its pre-eminent importance as a means of obtaining liberation from illegal confinement, is usually known simply as the writ of *habeas corpus*, and it is this writ which is referred to throughout this article, unless the other writs are mentioned specifically.

The writ of *habeas corpus ad subjiciendum* is a prerogative writ by which the king has a right to inquire the causes for which any of his subjects are deprived of their liberty (see per Lord Eldon, *Crowley's* case, 1818, 2 Swans. at p. 48; per Lord Mansfield, C.J., *R.* v. *Cowle*, 1759, 2 Burr. at p. 855; Corner, *Cr. Of. Pr.* 110), a writ of right (see 18 St. Tri. at p. 19), though not of course, for it is not to be issued except upon cause shown (see *Hobhouse's* case, 1820, 3 Barn. & Ald. 420; *Crowley's* case, 1818, 2 Swans. at p. 61), and is grantable *ex debito justitiæ* (see Bac. *Abr.* tit. *Habeas Corpus*).

Scope of the Writ of Habeas Corpus ad subjiciendum.—The fundamental principle of the English constitution, denoted by the various phrases "Liberty of the Subject," "the Right of Personal Security," etc., which is an essential part of the common law of England, and which is enunciated, though in no sense originated, by numerous constitutional charters and statutes dating from the Magna Carta, is effectively protected by the common law writ of *habeas corpus*. The writ affords an efficacious remedy in all cases of illegal restraint or confinement, and in its ancient form is directed to the person detaining another, commanding him to produce the body of the person detained, with the day and cause of his caption and detention, *ad faciendum, subjiciendum, et recipiendum*, to do, submit to, and receive whatsoever the judge or Court awarding the writ shall consider in that behalf (see Black. *Com.* bk. iii. ch. viii.). The writ thus provides an ample protection for the liberty of the subject by enabling any person who is alleged to be illegally detained or imprisoned to be actually produced before the Court, and to have the cause of his confinement then and there subjected to inquiry. If no legal justification of his detention can be shown, the Court will order his immediate release, and so he will regain the freedom of which he has been illegally deprived, and which, in the absence of lawful excuse for its deprivation, is the inherent right of every British subject.

Jurisdiction.—*Common Law Jurisdiction.*—The origin of the writ of *habeas corpus*, like that of most of the institutions of the common law, is lost in obscurity. The precise date of its origin cannot be ascertained. There is some ground for supposing that the writ was known in times anterior to the Magna Carta (see Hallam, *Middle Ages*, 5th ed., vol. ii. p. 449). It is certain, however, that the common law jurisdiction in *habeas corpus* is of very great antiquity. Sir Matthew Hale mentions an instance of the writ as early as 33 Edward I., and in the reign of Henry VI. the writ was of frequent occurrence and familiar to the judges (see Hale, *Hist. Com. Law*, 4th ed., p. 193; see also Year Book, 48 Edw. III. c. 22; *Vine's* case, 34 Hen. VI.).

The jurisdiction at common law, which extended to all cases of illegal

imprisonment or detention, whether under colour of public or private authority, was exercised by the Courts of King's Bench, Chancery, and Common Pleas, and in a case of privilege by the Court of Exchequer (see 2 *Inst.* 55; Black. *Com.* bk. iii. ch. viii.; Bac. *Abr.* tit. *Habeas Corpus* (B) 1).

The writ of *habeas corpus* being a high prerogative writ issued at common law out of the Court of King's Bench not only in term time, but also during the vacation (see *R.* v. *Shebbeare*, 1758, 1 Burr. 460; *R.* v. *Batcheldor*, *In re Canadian Prisoners*, 1839, 1 P. & D. 516), by a fiat from the chief justice or any other of the judges. If issued during the vacation, it was usually returnable before the judge himself who awarded it, and he proceeded himself thereon (see 4 Burr. 856), unless the term intervened, in which case it might be returned into Court (*R.* v. *Mead*, 1758, 1 Burr. 542; *R.* v. *James Clarke*, 1758, *ibid.* 606). It is clear that a judge at chambers has power at common law to issue in vacation a *habeas corpus* returnable before himself immediately (see *R.* v. *Batcheldor*, 1839, 1 P. & D. 516; S. C. *sub. nom. Watson's* case, 9 Ad. & E. 713). The Court of Chancery had power to grant the writ both during term and in vacation by virtue of its common law jurisdiction (see 4 *Inst.* 182; 2 Hale, P. C. 147; *In re Belson*, 1850, 7 Moo. P. C. C. 114, at p. 130).

As to the common law jurisdiction of the Courts of Common Pleas and Exchequer to grant the writ of *habeas corpus*, see *Bushel's* case, 1670, Vaugh. 155; *Wood's* case, 1771, 3 Wils. 172; *Crowley's* case, 1818, 2 Swans. 1; *Carus Wilson's* case, 1845, 7 Q. B. 984; see also 2 *Inst.* 55; 4 *ibid.* 290; 2 Hale, P. C. 144.

Statutory Jurisdiction.—Although the right of the writ of *habeas corpus* is a common law right and is not created by statute (see *In re Bessett*, 1844, 6 Q. B. 481), it has been confirmed and regulated by various statutes.

The Statute 16 Car. I. c. 10, s. 6, after reciting the provisions of the Magna Carta and several statutes of the reign of Edward III. relating to the liberty of the subject, enacted that any person restrained of his liberty or suffering imprisonment by command of the king or of his Privy Council, or of any of the lords of the Privy Council, upon demand or motion made to the judges of the Court of King's Bench or Common Pleas, in open Court, should without delay upon any pretence whatsoever, for the ordinary fees usually paid for the same, have forthwith granted to him a writ of *habeas corpus* to be directed to the gaoler or other person in whose custody he may be. The person to whom the writ is directed must, at the return to the writ, bring, or cause to be brought, the body of the party so committed or restrained before the judges of the Court from whence the writ issued, in open Court, and must then certify the true cause of his detainer or imprisonment, and thereupon the Court within three days after such return must proceed to examine and determine whether the cause of such commitment appearing upon the return be just and legal or not, and must thereupon do what to justice shall appertain either by delivering, bailing, or remanding the prisoner, under penalty of treble damages forfeitable to the party grieved.

This statute, which is still in force, was intended further to secure the liberty of the subject by regulating the issue of the writ in the particular cases of infringement of the right of personal security at the hands of the king or of the Privy Council, and was necessitated by the cases of arbitrary imprisonment which were very prevalent at the date of the statute (cp. *Darnel's* case, 1627, 3 St. Tri. 1), but which are now, happily, unknown.

The Habeas Corpus Act, 1679, 31 Car. II. c. 2, probably one of the best known, and certainly one of the most valuable, of the enactments upon the statute roll, was passed "for the better securing the liberty of the subject." This it effected by specifically meeting the various devices by which the common law right to the writ had hitherto been evaded, and, in particular, by making the writ readily accessible during the vacation, by obviating the necessity for the issue of an *alias* and *pluries* (see ALIAS; PLURIES), by imposing penalties for the refusal of the writ, and generally by regulating the granting and issue of the writ and the procedure upon its return.

Sec. 2 provides that if anyone be committed or detained for any crime, except for felony or treason plainly expressed in the warrant of commitment, in the vacation, he or anyone in his behalf may apply to "the Lord Chancellor, or Lord Keeper or any one of His Majesty's Justices of the one Bench or the other, or the Barons of the Exchequer of the degree of the Coif," who, upon view of the copy of the warrant of commitment, or upon oath made that such copy was denied by the gaoler, are, under penalty, required upon the request in writing by the person detained or anyone on his behalf, attested and subscribed by two justices, to award a *habeas corpus* under the seal of the Court of which he is a judge, returnable *immediatè* before himself. The statute also provides (s. 9) that, during the term, any such prisoner may move and obtain his *habeas corpus* "as well out of the High Court of Chancery or Court of Exchequer as out of the Courts of King's Bench or Common Pleas." The vexed question of jurisdiction was thus placed upon a statutory basis.

It should be observed that the Habeas Corpus Act, 1679, applies only to cases of detention or imprisonment for criminal or supposed criminal offences, and makes provision for the granting of the writ in such cases without in any way infringing on the common law jurisdiction of the Courts or judges.

At the present day, indeed, the writ of *habeas corpus* is almost invariably issued by virtue of the common law jurisdiction, and not under the statute.

The Habeas Corpus Act, 1816, 56 Geo. III. c. 100, s. 1, extended the provisions of the Act of 1679 with regard to the issue of writs of *habeas corpus* by the judges in vacation to the cases of persons being confined or restrained of their liberty otherwise than for some criminal or supposed criminal matter, and excepting persons imprisoned for debt or by process in any civil suit.

Suspension of Habeas Corpus Act.—Various statutes, justifiable only on the ground of political necessity, have at different periods of political agitation enabled persons to be arrested on suspicion of treasonable practices or certain other offences, and detained without bail or trial notwithstanding any law to the contrary, thus to a limited extent temporarily suspending the operation of the Habeas Corpus Act, 1679 (see, for example, 34 Geo. III. c. 54; 57 Geo. III. c. 3; 57 Geo. III. c. 55; 11 & 12 Vict. c. 35; 29 & 30 Vict. c. 1; 44 & 45 Vict. c. 4). These statutes, inaccurately termed Habeas Corpus Suspension Acts, in no sense suspend the general right to the writ of *habeas corpus*. A Suspension Act is usually an Annual Act, and is almost invariably followed by an Act of Indemnity, indemnifying persons who have acted in pursuance of the provisions of the Suspension Act (see, for example, 41 Geo. III. c. 66).

Places to which Writ runs.—The writ of *habeas corpus* being a preroga-

tive writ by the common law lies to any part of the dominions of the Crown (see 2 Roll. Abr. 69; *Bourne's* case, 1620, Cro. (2) 543; *R.* v. *Pell*, 1673, 3 Keb. 279; *R.* v. *Cowle*, 1759, 2 Burr. at p. 856).

The Habeas Corpus Act, 1679, s. 10, provided that the writ of *habeas corpus* within the meaning of that Act may be directed and run into any County Palatine, the Cinque Ports, or other privileged places within England, Wales, or the town of Berwick-upon-Tweed, and the islands of Jersey or Guernsey; any law or usage to the contrary notwithstanding. The Habeas Corpus Act, 1816, contains a similar provision with regard to writs within that Act, including the Isle of Man, in addition to the places above mentioned, and further providing that the writ may be directed or run into any port, harbour, road, creek, or bay upon the coast of England or Wales, although the same should lie out of the body of any county (s. 5). As to the issue of the writ to Jersey, see *In re Carus Wilson*, 1845, 7 Q. B. 984; *In re Belson*, 1850, 7 Moo. P. C. C. 114.

At common law the English Courts had jurisdiction to issue the writ into any of the colonies to bring up persons there illegally imprisoned, unless such jurisdiction with regard to any particular colony was taken away by statute. Under this jurisdiction a writ of *habeas corpus* was issued to Canada in the case of *Ex parte Anderson*, 1861, 3 El. & El. 487. In consequence of the decision in this case the Habeas Corpus Act, 1862 (25 & 26 Vict. c. 20), provided that no writ of *habeas corpus* should issue out of England into any colony or foreign dominion of the Crown where Her Majesty has a lawfully established Court of justice having authority to grant and issue the writ, and to ensure its due execution throughout such colony or dominion. The writ of *habeas corpus* can still issue out of the English Courts to the Isle of Man, that island having been held not to be a foreign dominion of the Crown within the meaning of the statute (see *In re James Brown*, 1864, 33 L. J. Q. B. N. S. 193; *In re Crawford*, 1849, 13 Q. B. 613).

Purposes for which Writ of Habeas Corpus is Granted.—Under the writ of *habeas corpus* the Court may examine into the legality of any commitment for a criminal or supposed criminal matter. The writ also enables prisoners who have been legally committed in some cases to be admitted to bail. Any unlawful detention of an individual or deprivation of the liberty of an individual, whether the alleged cause be civil or criminal, or if there be no ground at all alleged for the detention, may be inquired into by means of the issue of a writ of *habeas corpus*. Thus where a child is unlawfully detained from his parents or guardians or other persons entitled to his custody, where a married woman is wrongfully detained from her husband, where a person is illegally detained as a lunatic, or in military custody, or has been irregularly committed for extradition, and in any other case of wrongful deprivation of liberty, the writ of *habeas corpus* is the appropriate remedy.

Wherever, in short, a person is restrained of his liberty by being confined in a common gaol or by a private person, whether it be for a criminal or civil cause, he may regularly by *habeas corpus* have his body and cause removed to some superior jurisdiction which hath authority to examine the legality of such commitment, and on the return thereof either bail, discharge, or remand the prisoner (see Bacon, *Abr.* tit. *Habeas Corpus* (A); *Bushel's* case, 1670, Vaugh. 136).

The general object of the writ, as has already been indicated, is the protection of the liberty of the subject by affording a practical means of

effecting the release of persons illegally detained, whether under pretext of public or private authority or under no pretext at all. It follows, therefore, that the specific purposes for which the writ may be granted correspond in their diversity with the various ways in which the right of personal liberty may be infringed.

Regularity of Commitment.—Where a person is in custody under a warrant or order of commitment, the legality of the imprisonment depends upon the validity of the warrant or order. He may, therefore, test the validity of the legal process by virtue of which he is detained by means of the writ of *habeas corpus*. The jurisdiction of the Court on *habeas corpus* in such cases has been thus expressed: If it appears clearly that the fact for which the party is committed is no crime; or that it is a crime but he is committed for it by a person who has no jurisdiction, the Court discharges. If doubtful whether a crime or not, or whether the party be committed by a competent jurisdiction, or if it appears to be a crime but a bailable one, the Court bails him. If an offence not bailable, and committed by a competent jurisdiction, the Court remands or commits him (*Wilmot's Opinions*, p. 106). But a writ of *habeas corpus* is not grantable in general where the party is in execution on a criminal charge after judgment on an indictment according to the course of the common law (see *Ex parte Lees*, 1868, El. B. & E. 828), nor in the case of a commitment for contempt by either House of Parliament or by a Court of record (*Burdett* v. *Abbot*, 1811, 14 East, 1; case of the *Sheriff of Middlesex*, 1840, 11 Ad. & E. 273; *Ex parte Fernandez*, 1861, 10 C. B. N. S. 3).

As to the essentials to the validity of a warrant or an order of commitment, see WARRANT: COMMITMENT; CONVICTION; see also GENERAL WARRANT; CONTEMPT OF COURT; SUMMARY CONVICTION. For further information on this subject, see Burn, *Justice of the Peace*, tit. "Commitment"; Paley on *Summary Convictions*, 7th ed., 1892.

No order for the issue of a writ of *habeas corpus* will be granted where the validity of any warrant, commitment, order, conviction, inquisition, or record is to be questioned, unless at the time of moving a copy of such warrant, etc., verified by affidavit, be produced and handed to the officer of the Court before the motion be made, or the absence thereof accounted for to the satisfaction of the Court (Crown Office Rules, 1886, r. 35).

See generally as to the issue of the writ of *habeas corpus* to test the regularity of commitments, *Ex parte Allen*, 1834, 3 Nev. & M. 35; *R.* v. *Dunn*, 1840, 9 Car. & P. 509; *In re Richard Dunn*, 1847, 5 C. B. 215; *Ex parte Newton*, 1849, 13 Q. B. 716; *R.* v. *Lees*, 1858, 27 L. J. Q. B. 403; *Ex parte Cross*, 1857, 2 H. & N. 354; *In re Timson*, 1870, L. R. 5 Ex. 257.

In cases where the conviction itself is illegal or defective, as distinguished from cases where the commitment is defective, it is necessary to obtain a writ of *certiorari* directed to the convicting magistrate to return the conviction into the Queen's Bench Division, in addition to the *habeas corpus* to bring up the warrant (see *In re Allison*, 1854, 10 Ex. 561; *Ex parte Timson*, 1870, L. R. 5 Ex. 257).

As to the nature of the writ of *certiorari*, the purposes for which it is applicable, and the procedure in obtaining it, see the article CERTIORARI; see also Short and Mellor, *Crown Office Practice*, ch. iv.; and Paley on *Summary Convictions*, 7th ed., 1892, ch. v.

Extradition Cases.—Where a person is committed by a magistrate on the application of a foreign Government for extradition in respect of an

offence committed abroad, he may by means of *habeas corpus* test the validity of his commitment. The police magistrate when committing a prisoner for extradition must inform him that he will not be surrendered until after the expiration of fifteen days, and that he has a right to apply for a writ of *habeas corpus*. The period of fifteen days may be extended by the Secretary of State (see Extradition Act, 1870, 33 & 34 Vict. c. 52, ss. 3 and 11).

As to the law and procedure relating to the extradition of fugitive criminals, see the article EXTRADITION. See also the Extradition Act, 1870, 33 & 34 Vict. c. 52; the Extradition Act, 1873, 36 & 37 Vict. c. 60, and the various treaties to which those Acts have been applied by Orders in Council from time to time; reference should also be made to Clarke on *Extradition*, 3rd ed., 1888.

No one may be surrendered for extradition in respect of an offence of a political character (see Extradition Act, 1870, s. 3 (1)). The decision of a magistrate who commits a prisoner for extradition that the offence charged is not of a political character, may be reviewed by the Court on an application for a writ of *habeas corpus* (*In re Castioni*, [1891] 1 Q. B. 149). Nor may anyone be surrendered if he proves to the satisfaction of the Court that the requisition for his surrender has been made with a view to try to punish him for an offence of a political character (Extradition Act, 1870, s. 3 (1)). This, however, applies only to an offence of a political character which has already been committed (see *In re Arton*, [1896] 1 Q. B. 108).

The following are important decisions on *habeas corpus* in extradition cases:—*Ex parte Bouvier*, 1872, 12 Cox C. C. 303; *Ex parte Counhaye*, 1873, 42 L. J. Q. B. 217; *Ex parte Wilson*, 1877, 3 Q. B. D. 42; *Ex parte Lavandier*, 1881, 15 Cox C. C. 329; *Ex parte Ganz*, 1882, 9 Q. B. D. 93; *Ex parte Weil*, 1882, *ibid.* 701; *Ex parte Maurer*, 1883, 10 Q. B. D. 513; *Ex parte Woodhall*, 1888, 57 L. J. M. C. 71; *Ex parte Guerin*, 1888, 16 Cox C. C. 596; *In re Castioni*, [1891] 1 Q. B. 149; *In re Meunier*, [1894] 2 Q. B. 415; *In re Arton*, No. 1, [1896] 1 Q. B. 108; *In re Galwey*, [1896] 1 Q. B. 230; *In re Arton*, No. 2, [1896] 1 Q. B. 509).

Military Custody.—Where a person is detained illegally in military custody his remedy is by writ of *habeas corpus* directed to the officer detaining him. Thus the writ has been granted to a person under military arrest on the ground that he was not speedily brought to trial by court-martial pursuant to military law (see *Ex parte Blake*, 1814, 2 M. & S. 428). The Courts have power upon *habeas corpus* to examine the merits of naval or military proceedings and the legality of imprisonment under colour of naval or military authority (see *Wolfe Tone's* case, 1798, 27 St. Tri. 614; *R.* v. *Suddis*, 1801, 1 East, 306; *In re Allen*, 1860, 3 El. &. El. 338; *In re Douglas*, 1842, 3 Q. B. 825; *R.* v. *Cuming and Another, Ex parte Hall*, 1887, 19 Q. B. D. 13).

Bail. — In the case of an improper refusal of bail, the remedy at common law was by *habeas corpus* (see 4 *Inst.* 290). Under the present practice, however, there are two modes of procedure by which a prisoner may be admitted to bail, the Crown Office Rules providing that applications for bail in felony or misdemeanour must in the first instance be made by summons before a judge at chambers for a writ of *habeas corpus*, or to show cause why the defendant should not be admitted to bail, either before a judge at chambers or before a justice of the peace, in such amount as the judge may direct (C. O. R. 1886, r. 122). The application by summons to admit

to bail being the more convenient procedure is usually adopted, but the writ of *habeas corpus* may still be resorted to in any case as a means of obtaining bail, and in some cases, *e.g.* where a magistrate has refused to accept the sureties tendered, application for a *habeas corpus* would be the proper course (see Short and Mellor, *Cr. Of. Pr.* p. 381).

The application for a writ of *habeas corpus* to obtain bail in cases of felony or misdemeanour must be made by summons at chambers (C. O. R. 1886, r. 122); but the judge has power to order the writ to issue *ex parte* in the first instance (see *ibid.* r. 237).

As to admitting a prisoner under remand to bail by *habeas corpus*, see *R.* v. *Burnett*, 1870, 49 L. T. at p. 388; *R.* v. *Atkins*, 1870, *ibid.* 421; *R.* v. *Manning*, 1888, 5 T. L. R. 139.

See generally as to the circumstances under which a person is entitled to be admitted to bail, the article BAIL; see also Habeas Corpus Act, 1679, s. 7.

The application for a *habeas corpus* to admit to bail must be supported by affidavit, a copy of the warrant of commitment verified by affidavit must be produced (see C. O. R. 1886, r. 35), and a copy of the depositions verified by affidavit is also necessary (see *R.* v. *Barthelemy*, 1852, 1 Dear. 60).

For form of writ of *habeas corpus* to bring up a prisoner to be bailed, see C. O. R. 1886, Form 69; for form of notice of bail upon *habeas corpus*, *ibid.*, Form 74.

If bail be granted, the defendant and his sureties must enter into recognisances to appear at the next assizes or sessions (for form of recognisance, see *ibid.*, Form 75). The prisoner is then entitled to be released on his bail.

Custody of Infants.—In the application of the writ of *habeas corpus* to cases involving the right to the custody of infants, the original scope of the writ appears to have been somewhat extended.

The writ originally afforded a remedy for illegal imprisonment, and was invoked at the instance of the prisoner; in later times an unauthorised detention of a child from the legal custody of its parents or guardians has, for the purpose of the issue of the writ, been regarded as equivalent to imprisonment.

The writ may issue at the instance of a parent or guardian, not only without the privity of the child, but even against its express wishes (see the American decisions in *The People* v. *Mercein*, 3 Hill, 399; *The Commonwealth* v. *Hamilton*, 6 Mass. 273). Nor is it necessary to allege that any force or restraint is used towards the infant by the person in whose custody it is (see *Ex parte M'Clellan*, 1831, 1 Dowl. P. C. 81). A child is, in fact, supposed to be unlawfully imprisoned when unlawfully detained from its parent or guardian or other person legally entitled to its custody (see per Lord Campbell, C.J., *R.* v. *Maria Clarke*, 1857, 7 El. & Bl. at p. 193; see also *R.* v. *Greenhill*, 1836, 4 Ad. & E. 624; *In re Hakewill*, 1852, 12 C. B. 223). But where a child has arrived at years of discretion, the Court will consult its wishes before making an order as to its custody (see *R.* v. *Howes*, 1860, 30 L. J. M. C. 47; *In re Connor*, 1863, 16 Ir. C. L. 112; *In re Agar-Ellis*, 1883, 24 Ch. D. at p. 326).

Formerly there was some divergence in the rules as to the custody of infants as administered in the Courts of common law and in the Courts of equity. Now, however, by virtue of the Judicature Act, 1873 (36 & 37 Vict. c. 66, s. 25 (10)), the jurisdiction of the Courts is concurrent, but in

the exercise of that jurisdiction the rules of equity are to prevail (see *In re Goldsworthy*, 1876, 2 Q. B. D. 75; *In re Ethel Brown*, 1884, 13 Q. B. D. 614; *R.* v. *Gyngall*, [1893] 2 Q. B. 231).

Where the head of an institution for destitute children in which a child had been placed had, without authority from the parent of the child, handed him over to another person to be taken to Canada, and alleged that he did not know where the child was, it was held, on an application by the parent for a writ of *habeas corpus*, that the writ ought to issue on the ground that the applicant was entitled to require a return to be made to the writ so that the facts might be more fully investigated (*Barnardo* v. *Ford*, *Gossage's* case, [1892] App. Cas. (H. L.) 326, disapproving *R.* v. *Barnardo*, *Tye's* case, 1889, 23 Q. B. D. 305).

The authority of a foreign parent over his child is recognised in England only to the extent to which an English parent would have similar authority, the question being governed by English law (see *Johnstone* v. *Beattie*, 1843, 10 Cl. & Fin. 113). And as a matter of international comity, the authority of a foreign guardian is generally recognised, though strictly he has no rights over a ward in England (*ibid.*; *Stuart* v. *Bute*, 1861, 9 H. L. 440; *Nugent* v. *Vetzera*, 1866, L. R. 2 Eq. 704; *Di Savini* v. *Lousada*, 1870, 18 W. R. 425). But on an application by *habeas corpus* by the attorney of a foreign father, who was abroad, for the custody of his children, who were living in England with their mother, the Court refused to hand them over to the father's agent, no valid reason being shown for the father not attending personally to receive them (*R.* v. *Scherschewsky*, 1892, 8 T. L. R. 571: see also *In re Preston*, 1847, 5 D. & L. 233).

For the general law relating to the rights of custody and education of infants reference should be made to the articles INFANTS; PARENT AND CHILD; see also the Custody of Infants Act, 1873 (36 & 37 Vict. c. 12); the Guardianship of Infants Act, 1886 (49 & 50 Vict. c. 27); the Custody of Children Act, 1891 (54 & 55 Vict. c. 3); *R.* v. *Nash*, 1883, 10 Q. B. D. 454; *In re Agar-Ellis*, 1883, 24 Ch. D. 317; *In re Scanlan*, 1888, 40 Ch. D. 200; *Barnardo* v. *M'Hugh*, [1891] App. Cas. (H. L.) 388, affirming *R.* v. *Barnardo*, *Jones'* case, [1891] 1 Q. B. 194; *In re M'Grath*, [1892] 2 Ch. 496; *R.* v. *Gyngall*, [1893] 2 Q. B. 231; *Ex parte Emerson*, 1895, 11 T. L. R. 218; *In re Newton*, [1896] 1 Ch. 740; *In re A. & B.* (*Infants*), [1897] Ch. 786.

Husband and Wife.—The writ would lie at the instance of a husband to regain the custody of his wife who is being wrongfully detained from him against her consent; for a husband at common law is entitled to the custody of his wife as against all other persons (see *Atwood* v. *Atwood*, 1718, Fin. Prec. 492; *In re Cochrane*, 1840, 8 Dowl. P. C. 630; *In re Price*, 1860, 2 F. & F. 263; see also HUSBAND AND WIFE).

But it has been held that a husband has not such a right to the custody of his wife's person as a father has to that of his child; a wife is entitled to exercise judgment and discretion (see *Ex parte M'Clellan*, 1831, Dowl. P. C. 81; *R.* v. *Leggatt*, 1852, 18 Q. B. 784). So where a wife had left her husband on account of his ill-usage, and had gone to her mother for protection, and was ready to swear the peace against her husband, the Court refused to order her to be delivered up to him (see *R.* v. *Brooke and Another*, *Anne Gregory's* case, 1766, 4 Burr. 1991). And where a wife by her own desire is living apart from her husband, and is under no restraint, the Court will not grant a *habeas corpus* on the

application of her husband for the purpose of restoring her to his custody (see *R.* v. *Leggatt*, 1852, 18 Q. B. 784). The tendency of modern decision appears to be against restoring a wife to her husband on *habeas corpus* where she remains away from him by her own wish.

Moreover, a wife is entitled to a *habeas corpus* directed to her husband where he restrains her without right, *e.g.* after a separation deed has been executed (see *R.* v. *Lister*, 1721, 8 Mod. 22). In a recent case a writ of *habeas corpus* was issued on behalf of a wife directed to her husband, in whose custody she was forcibly detained. On the return to the writ the husband stated that he was entitled to keep her in confinement in order to enforce restitution of conjugal rights. The return was held to be bad, and the wife ordered to go free (see *R.* v. *Jackson*, [1891] 1 Q. B. 671, where the earlier cases on the subject are reviewed; and *In re Cochrane*, 1840, 8 Dowl. P. C. 630, is overruled).

Lunatics.—The writ of *habeas corpus* is available to compel the production before the Court of persons who are illegally detained in private custody under the pretence of insanity or lunacy (see *R.* v. *Turlington*, 1761, 2 Burr. 1115; *In re Greenwood*, 1855, 24 L. J. Q. B. 148; see also *In re Elton*, reported in the *Times* newspaper 1st May 1896). When a person is alleged to be detained as a lunatic without cause, the Court will frequently order a medical examination to be made, the motion for the writ of *habeas corpus* standing over until the result of the examination is known (see *R.* v. *Wright*, 1760, 2 Burr. 1100; *R.* v. *Turlington*, 1761, *supra*; *R.* v. *Riall*, 1860, 11 Ir. R. C. L. (N. S.) 279). A strong case will have to be made out before the writ will be granted on the ground of a wrongful confinement as a lunatic, owing to the inconvenience which would result from the issue of the writ on a groundless application (see *R.* v. *William Clarke*, 1762, 3 Burr. 1362). There must either be an affidavit by the alleged lunatic himself, or it must be clearly shown that he is prevented from making one (see *Ex parte Child*, 1854, 15 C. B. 238; see also *In re Parker*, case of the *Canadian Prisoners*, 1839, 5 Mee. & W. 32; and *In re Carter*, 1893, 95 L. T. 37). See further as to the legality of detention of persons on the ground of lunacy, the article ASYLUMS.

Miscellaneous Cases.—It is impossible to exhaustively catalogue the different purposes for which the writ of *habeas corpus* provides an effective remedy, extending as it does to all cases of wrongful confinement. The writ has been used to secure the freedom of a slave who, having been brought to England by his master, left his service and refused to return, and was subsequently seized by his former master and handed over to the custody of the captain of a ship. It was held that a person forcibly detained in England as a slave is entitled to be discharged on *habeas corpus* (*Sommersett's* case, 1772, 20 St. Tri. 1; see also *Shanley* v. *Harvey*, 1762, 2 Eden, 126). But when a slave having been brought to England voluntarily went abroad with her owner, it was held that upon returning voluntarily to a country where slavery was legal, she reverted to the condition of a slave (case of the slave *Grace*, 1827, 2 Hag. Adm. 94). The writ was, in one case, issued upon the allegation that a helpless and ignorant foreigner had been brought into this country and exhibited against her consent (case of the *Hottentot Venus*, 1810, 13 East, 195; 12 R. R. 320). The writ is also available in cases of illegal impressment for the army or navy (as to which see the article IMPRESSMENT; see also *Ex parte Fox*, 1793, 5 T. R. 276; 2 R. R. 596; *Ex parte Harrison*, 1805,

2 Sm. 408). This application of the writ is, however, at the present day of merely historical interest, impressment not being resorted to.

Cases in which Habeas Corpus will not be granted.—It may be stated generally that there are two classes of cases in which an application for a writ of *habeas corpus* may be refused—(1) Cases which are expressly excepted by the provisions of the Habeas Corpus Act, 1679; and (2) cases in which no probable ground for relief is shown (except such cases as fall within sec. 10 of the same Act).

Sec. 2 of the Habeas Corpus Act, 1679, expressly excepts from the provisions of the Act persons who are committed "for felony or treason plainly expressed in the warrant of commitment," and also "persons convict or in execution by legal process." Such persons, therefore, are not entitled to the writ of *habeas corpus* either during the law sittings or in vacation.

Thus the writ is not generally issuable where a party is in execution of a legal sentence after conviction on indictment (*Ex parte Lees*, 1860, El. B. & E. 828), or in cases of commitment for contempt by either House of Parliament (*Burdett* v. *Abbot*, 1811, 14 East, 1; case of the *Sheriff of Middlesex*, 1840, 11 Ad. & E. 273), or by a Court of record (*Ex parte Fernandez*, 1861, 10 C. B. N. S. 3; see also *In re Clarke*, 1842, 11 L. J. Q. B. 75). And the writ will not be granted where it would falsify the record of a Court which shows jurisdiction on the face of it (*Ex parte Newton*, 1855, 24 L. J. C. P. 148), nor where the effect of it would be to review the judgment of a superior Court which may be reviewed on writ of error (*In re Dunn*, 1847, 17 L. J. C. P. 97); nor to enable a person in custody to appear in Court merely for the purpose of arguing his case in person (*Weldon* v. *Neal*, 1885, 15 Q. B. D. 471).

With regard to the necessity for showing some probable ground for relief, the writ is granted on motion because it cannot be had of course (see per Vaughan, C.J., *Bushel's* case, 1670, Vaugh. 135; see also *Crowley's* case, 1818, 2 Swans. 1; *R.* v. *Hobhouse*, 1820, 3 Barn. & Ald. 420); and it is pointed out by Blackstone (*Com.* bk. iii. ch. viii.) that if it issued of mere course without showing to the Court or judge some reasonable ground for awarding it, a traitor or felon under sentence of death, a soldier, a mariner in the king's service, a child, relation, or a domestic confined for insanity or other prudential reasons, might obtain a temporary enlargement by suing out a *habeas corpus*, though sure to be remanded as soon as brought up to the Court, and therefore Sir Edward Coke, C.J., did not scruple to deny a *habeas corpus* to one confined by the Court of Admiralty for piracy, there appearing upon his own showing sufficient grounds to confine him (see 2 Rolle, 138). But in cases within sec. 9 of the Habeas Corpus Act, 1679, a judge at chambers in vacation may perhaps be obliged to grant the writ as of course (see per Best, J., *R.* v. *Hobhouse*, 1820, 3 Barn. & Ald. at p. 425).

The writ of *habeas corpus* does not lie to free an alien enemy who is a prisoner at war (see *The Three Spanish Sailors'* case, 1779, 2 Black. W. 1324; see also *R.* v. *Schiever*, 1759, 2 Burr. 765).

A master is not entitled to a *habeas corpus* for the purpose of regaining the custody of an apprentice who of his own accord has entered the service of another person, the object of the writ being merely to protect personal liberty (see *R.* v. *Reynolds*, 1795, 6 T. R. 497; *R.* v. *Edwards*, 1798, 7 T. R. 745; *Ex parte Landsdowne*, 1804, 5 East, 38; *Ex parte Gill*, 1806, 7 East, 376).

It should be added that the writ of *habeas corpus* being intended to facilitate the release of persons actually detained in unlawful custody is merely remedial, and will not be issued for punitive purposes (see the judgments of the House of Lords in *Barnardo* v. *Ford*, [1892] App. Cas. pp. 332–340).

Application for the Writ.—*How made.*—Application for the writ, whether at common law or under the Habeas Corpus Act, 1679, may be made during the law sittings either to a Divisional Court or to a judge at chambers (C. O. R. 1886, rr. 235 and 254).

During the vacation the application may be made to a judge at chambers (case of *Leonard Watson and Others*, 1839, 9 Ad. & E. 731).

In all criminal matters and causes on the Crown side of the Queen's Bench Division the writ of *habeas corpus* must be issued from the Crown Office (see *In re Taylor*, 1803, 3 East, 232; *Easton's* case, 1840, 12 Ad. & E. 645).

The practice on the Crown side of the Queen's Bench Division is now regulated by the Crown Office Rules of 1886. Under these rules the application for a *habeas corpus* may be made to the Court, *i.e.* a Divisional Court of the Queen's Bench Division (see *ibid.* rr. 235 and 254), or a judge (*ibid.* r. 235). Where the application is made to the Court it must be made by motion for an order, which, if the Court so direct, may be made absolute *ex parte* for the writ to issue in the first instance: or, if the Court so direct, they may grant an order *nisi* (*ibid.* r. 236). Where the application is made to a judge, he may order the writ to issue *ex parte* in the first instance, or may direct a summons for the writ to issue (*ibid.* r. 237). No summons to show cause before a judge at chambers can, however, be issued without leave of a judge upon an *ex parte* application for a writ of *habeas corpus* (*ibid.* r. 305 (*c*)). In all proceedings, civil or criminal, on the Crown side at chambers, the summons must be issued from, and drawn up at, the Crown Office (*ibid.* r. 304; for form of summons for writ of *habeas corpus*, see *ibid.* Form 174).

It has been the practice of recent years for the writ to be granted by a judge at chambers during the law sittings as well as in vacation. An application for a *habeas corpus* should, however, as a rule, only be made to a judge in chambers during the vacation, excepting in cases involving the custody of infants (see Short and Mellor, *Cr. Of. Pr.* pp. 108, 352). But in cases relating to the custody of children the application should, even during the law sittings, be made in the first instance to a judge at chambers. In extradition cases, on the other hand, during the sittings the application must always be made to the Court, the Crown Office Rules expressly providing that no application for a writ of *habeas corpus* on a warrant of extradition shall be made to a judge at chambers during the sittings (*ibid.* r. 238). It is the practice in extradition cases to apply on affidavit for a rule *nisi* calling on the Home Secretary, the chief metropolitan magistrate, and the foreign Government to show cause why the writ should not issue (see *Ex parte Ganz*, 1882, 9 Q. B. D. 93 *n*).

As to the practice with regard to motions on the Crown Office side, see Crown Office Rules, 1886, rr. 250–260.

On an application to the Court, the motion should, as a rule, be made by counsel (see *In re Newton*, 1855, 16 C. B. at p. 99); but the Court allowed it to be made by a wife on behalf of her husband in *Ex parte Cobbett*, 1850, 15 Q. B. 988. It is not, however, necessary that the party imprisoned or detained should have expressly authorised the application;

indeed, the very circumstances of some of the most urgent cases would render this impossible. It is sufficient that the application, whoever it may be made by, shows some probable ground for the supposition that the person on whose behalf it is made is involuntarily and wrongfully restrained or imprisoned (see case of the *Hottentot Venus*, 1810, 13 East, 195). Where access is denied to a person alleged to be detained, application for a *habeas corpus* may be made at the instigation of any relative, friend, or agent, on affidavit showing the reasons (see *In re Daley*, 1860, 2 F. & F. 258; *In re Thompson*, 1860, 30 L. J. M. C. 19; see also *Ashby* v. *White*, 1704, 14 How. St. Tr., 4th Resolution, at p. 825).

Affidavit in support of Application.—The application must be supported by affidavit, for the writ of *habeas corpus*, whether at common law or under the Habeas Corpus Act, 1679, does not issue as a matter of course, but must be granted on an affidavit upon which the Court can exercise its discretion as to whether it shall issue or not (see *R.* v. *Hobhouse*, 1820, 3 Barn. & Ald. 420; see also C. O. R. 1886, r. 253). A writ which issues on a probable cause verified by affidavit is as much a writ of right as a writ which issues of course (see Wilmot's *Opinions*, 1758, pp. 81, 87, and 88). An affidavit is absolutely necessary, either from the party who claims the writ or from some other person so as to satisfy the Court that he is so coerced as to be unable to make it (see *In re Parker*, the case of the *Canadian Prisoners*, 1839, 5 Mee. & W. 32; see also *Ex parte Child*, 1854, 15 C. B. 238).

As to the form in which the affidavit is to be drawn, how it must be entitled, its contents, and how it must be sworn, filed, and stamped, see Crown Office Rules, 1886, rr. 5–27.

The Writ.—An order *nisi* is frequently granted in the first instance, but when it is necessary, as in many cases relating to the custody of children, the order may by discretion of the Court be made absolute *ex parte* for the writ to issue in the first instance (see C. O. R. 1886, r. 236).

The writ must issue from the Crown Office in all criminal matters (*Taylor's* case, 1803, 3 East, 232; *Easton's* case, 1840, 12 Ad. & E. 645).

Form of Writ.—The following is the form of the writ of *habeas corpus ad subjiciendum*, as given in the Appendix to the Crown Office Rules, 1886 (Form No. 176):—

Victoria, by the Grace of God, etc., to greeting: We command you that you have in the Queen's Bench Division of Our High Court of Justice [*or* before a judge in chambers] at the Royal Courts of Justice, London, immediately after the receipt of this Our writ, the body of A. B., being taken and detained under your custody as is said, together with the day and cause of his being taken and detained, by whatsoever name he may be called therein, to undergo and receive all and singular such matters and things as Our said Court [*or* judge] shall then and there consider of concerning him in this behalf; and have you there then this Our writ.

To be indorsed.

By order of Court [*or* Mr. Justice].
This writ was issued by, etc.

For the old form of the writ in Latin, see 2 *Inst.* 53; *R.* v. *Gardner*, 43 Eliz. Tremaine, P. C. 324; see also the form used in *Carus Wilson's* case, 1845, 7 Q. B. 984.

As to the practice with regard to the drawing up, issue, teste, and service of the writ, see C. O. R. 1886, rr. 229–234; see also Short and Mellor, *Cr. Of. Pr.* pp. 353, 354. As to the notice to be served with the writ, and as to the notice to be served on the committing magistrates in cases of illegal commitment, see C. O. R. 1886, Forms 177 and 178.

As to quashing the writ on the ground of irregularity in its issue, or that it was obtained by fraudulent misrepresentation, see *Carus Wilson's* case, 1845, 7 Q. B. 984.

On the argument of an order *nisi* for a writ of *habeas corpus* the Court may in its discretion direct an order to be drawn up for the prisoner's discharge instead of waiting for the return of the writ (C. O. R. 1886, r. 244).

Disobedience to the Writ.—If a writ of *habeas corpus* be disobeyed by the person to whom it is directed, application may be made to the Court on an affidavit of service and disobedience for an attachment for contempt (C. O. R. 1886, r. 240). In vacation an application may be made to a judge in chambers for a warrant for the apprehension of the person in contempt to be brought before him or some other judge, to be bound over to appear in Court at the next ensuing sittings to answer for his contempt, or to be committed to prison for want of bail (*ibid.*; see also Habeas Corpus Act, 1816, ss. 2 and 6).

Attachment for contempt is the appropriate mode of enforcing obedience to the writ of *habeas corpus*, whether the writ be issued at common law or under the Habeas Corpus Act, 1679 (see *R.* v. *Barber*, 1758, 2 Ken. Ld. 289; *R.* v. *Woodward*, *In re Thompson*, 1889, 5 T. L. R. 565). An attachment may issue against a peer where he makes no return to a writ of *habeas corpus* (*R.* v. *Earl Ferrers*, 1758, 1 Burr. 631).

A reasonable time will be allowed for making the return before granting an attachment (see *Stockdale* v. *Hansard*, 1840, 8 Dowl. P. C. 474).

To compel obedience to a writ of *habeas corpus* there must be a search at the Crown Office for the return, and if not found, application may be made upon affidavit for an attachment (see *Ex parte Harrison*, 1805, 2 Sm. 408). Attachment will issue against a party intentionally making a false or insufficient return (*In re Winton*, 1792, 5 T. R. 89; *Leonard Watson's* case, 1839, 9 Ad. & E. 731; *In re Matthews*, 1860, 12 Ir. R. C. L. at p. 272), but not where immaterial matters are untruly but unintentionally set forth in a return (see per Lord Denman, C.J., *Leonard Watson's* case, 1839, 9 Ad. & E. at p. 804).

Attachment for disobedience to the writ in not making a return will not be granted against the person to whom the writ is directed unless he was personally served with the original writ (*R.* v. *Rowe*, 1895, 71 L. T. 578).

As to the practice with regard to attachment for contempt, see Crown Office Rules, 1886, rr. 261–276; for form of affidavit of service, *ibid.* Form No. 179; and for form of search at the Crown Office, *ibid.* Form No. 180.

Under the Habeas Corpus Act, 1679, s. 4, the gaoler or other officer neglecting or refusing to make the return required by the Act is liable to forfeit to the party grieved for the first offence £100, and for the second offence £200, and is incapable of holding or executing his office.

The Return.—The person to whom the writ of *habeas corpus* is directed must at the time stated in the notice which is served with the writ (see C. O. R. 1886, Form No. 177) produce the body of the person detained, and make a formal return in compliance with the writ.

Every writ of *habeas corpus* is made returnable immediately unless other-

wise ordered (see Habeas Corpus Act, 1679; C. O. R. 1886, r. 232; and *ibid.* Form No. 176).

Under the Habeas Corpus Act, 1816, s. 2, a writ issued in vacation may be made returnable in Court in the next term, and writs issued in term may be made returnable in vacation before a judge, where the writ is awarded too late in the term or vacation to be conveniently obeyed within the term or vacation respectively.

Where, as is usually the practice, the writ issues at common law, a reasonable time is allowed for making the return (see *Stockdale* v. *Hansard*, *Ex parte the Sheriff of Middlesex*, 1840, 8 Dowl. P. C. 474). And in cases under the Habeas Corpus Act, 1679, three days after the delivery of the writ are allowed by the statute for making the return if the distance the prisoner has to be brought is within twenty miles, ten days if beyond that distance and within a hundred miles, and twenty days if beyond a hundred miles (see *ibid.* s. 2).

The return must contain a copy of all the causes of the prisoner's detainer indorsed on the writ or on a separate schedule annexed to it (C. O. R. 1886, r. 241). Facts showing a sufficient ground for detention must be clearly and directly set forth on the return (see *Deybel's* case, 1821, 4 Barn. & Ald. 243; *Souden's* case, 1821, *ibid.* 294; *Nash's* case, 1821, *ibid.* 295; *In re Parker*, 1839, 5 Mee. & W. 32). A return which on the face of it is ambiguous is bad (see *R.* v. *Roberts*, 1860, 2 F. & F. 272).

Where the prisoner has been discharged before the return, that fact must appear on the return, though in such case it is not necessary to set forth the cause of taking and detainer (see *R.* v. *Gavin*, 1848, 15 Jur. 329, note).

When the writ is not obeyed by bringing up the party, the return must state very distinctly and unequivocally the reasons why it is not and cannot be obeyed (see *R.* v. *Winton*, 1792, 5 T. R. 89).

The impossibility of producing the party in obedience to the writ would be a sufficient return, the object of the writ being remedial and not punitive (see *Barnardo* v. *Ford*, [1892] App. Cas. (H. L.) 326, overruling *R.* v. *Barnardo*, *Tye's* case, 1889, 23 Q. B. D. 305).

As to the form and sufficiency of a return to a writ of *habeas corpus*, see the judgments in *R.* v. *Winton*, 1792, 5 T. R. 89; *R.* v. *Suddis*, 1801, 1 East, 306; *Ex parte Krans*, 1823, 1 Barn. & Cress. 258; *In re Parker*, the case of the *Canadian Prisoners*, 1839, 5 Mee. & W. 32; case of *Leonard Watson*, 1839, 9 Ad. & E. 731; *R.* v. *Richards*, 1844, 5 Q. B. 926; *Ex parte Bessett*, 1844, 6 Q. B. 481; *R.* v. *Roberts*, 1860, 2 F. & F. 272; *In re Matthews*, 1860, 12 Ir. R. C. L. 241; *R.* v. *Jackson*, [1891] 1 Q. B. 671.

The return may be amended or another substituted for it by leave of the Court or a judge (C. O. R. 1886, r. 242). Where a return to the writ is made, the return must first be read and motion then made for discharging or remanding the prisoner, or amending or quashing the return (*ibid.* r. 243).

The Court or judge before whom the writ is returnable in cases under the Habeas Corpus Act, 1816, is empowered to examine into the truth of the facts set forth in the return by affidavit or affirmation, and to do therein as to justice shall appertain (s. 3). A judge at chambers has power in term or vacation to refer the matter to the Court (see *ibid.* s. 4; see also *R.* v. *Reader*, 1845, 1 Stra. 531; *In re Turner*, 1846, 15 L. J. M. C. 140).

When the return shows that the party is in execution after sentence on indictment for a criminal charge, the return cannot be controverted (*R.* v.

Suddis, 1801, 1 East, 306; *Carus Wilson's* case, 1845, 7 Q. B. 984). But the Court have in some cases allowed the return to be controverted; and where a prisoner is brought up under a *habeas corpus* issued at common law, it has been held that he may controvert the truth of the return by virtue of the Habeas Corpus Act, 1816 (see *Ex parte Beeching*, 1825, 4 Barn. & Cress. 136).

Generally, as to the disputed question of the admissibility of evidence to controvert the truth of a return in cases of the issue of the writ at common law, see *In re Crawford*, 1849, 13 Q. B. 613; case of *Leonard Watson*, 1839, 9 Ad. & E. 805; *R.* v. *Douglas*, 1842, 12 L. J. Q. B. 49; see also Short and Mellor, *Cr. Of. Pr.* pp. 360–363.

On the return of the writ pending the hearing, the prisoner is detained, not under the authority of the original warrant, but under the authority of the writ of *habeas corpus*; and he may be bailed or remanded from time to time at the discretion of the Court (see *R.* v. *Bethel*, 1697, 5 Mod. 19).

Upon the argument before the Court on the return of a writ of *habeas corpus* the party in whose favour judgment is given must forthwith draw up an order in accordance with the decision at the Crown Office, and the writ, and return, and affidavits must be filed there. When the order has been made by a judge at chambers the writ and return, with the affidavits, and a copy of the judge's order, must be forthwith transmitted to the Crown Office to be filed (C. O. R. 1886, r. 245).

Appeal.—No appeal lies from any judgment of any judge of the High Court in any criminal cause or matter, except for some error of law apparent upon the record, as to which no question has been reserved for consideration under the Crown Cases Act, 1848, 11 & 12 Vict. c. 78 (see Judicature Act, 1873, 36 & 37 Vict. c. 66, s. 47). This, however, does not apply to appeals from chambers (see *Ex parte Pulbrook*, [1892] 1 Q. B. at p. 90).

An appeal, therefore, does not lie from the decision of the Queen's Bench Division granting or refusing a writ of *habeas corpus* in any "criminal cause or matter" within the meaning of sec. 47 of the Judicature Act, 1873. Thus it has been held that no appeal will lie from a decision of the Queen's Bench Division refusing a writ of *habeas corpus* on the application of a person in custody for an alleged crime under the Extradition Act, 1870 (*Ex parte Alice Woodhall*, 1888, 20 Q. B. D. 832; see also *R.* v. *Weil*, 1882, 9 Q. B. D. 701). So, where a person has been discharged from custody by an order of the High Court under a *habeas corpus*, the Court of Appeal has no jurisdiction to entertain an appeal (see *Bell Cox* v. *Hakes*, 1890, 15 App. Cas. (H. L.) 506, reversing the decision of the Court of Appeal in 20 Q. B. D. 1).

Whether a "cause or matter" is criminal within the meaning of sec. 47 of the Judicature Act, 1873, depends upon the nature of the proceeding, not of the subject-matter of the complaint; it is criminal if the proceedings are such that they may, but not necessarily must, eventually end in imprisonment (see *Seaman* v. *Burley*, [1896] 2 Q. B. 344).

It seems to be somewhat uncertain as to whether in non-criminal cases an appeal lies from a refusal to grant a *habeas corpus*. In *Ex parte Bell Cox*, 1887, 20 Q. B. D. 1, the Court appeared to consider that an appeal would lie in such a case. The question was left open by the House of Lords in *Bell Cox* v. *Hakes*, 1890, 15 App. Cas. 506; and although the question subsequently arose in *R.* v. *Jackson*, [1891] 1 Q. B. 671, there was no argument upon it before the Court of Appeal (see *ibid.* p. 671, note 2).

It is, however, clear that where an application for the writ is refused, the applicant has in every case a right to go from Court to Court and make a fresh application to each Court in turn (see *Ex parte Partington*, 1845, 2 Dow. & L. 650; and per Halsbury, L.C., *Bell Cox* v. *Hakes*, 1890, 15 App. Cas. (H. L.) at p. 514).

It is now decided that where the object of the writ of *habeas corpus* is to determine who is entitled to have the custody and control of an infant, an appeal will lie from an order of the Queen's Bench Division directing the issue of a writ to bring the infant before the Court (see *R.* v. *Barnardo*, *Jones'* case, [1891] 1 Q. B. 194, affirmed on appeal by the House of Lords, *sub. nom. Barnardo* v. *M'Hugh*, [1891] App. Cas. (H. L.) 388; see also *Barnardo* v. *Ford*, [1892] App. Cas. (H. L.) 327, affirming *R.* v. *Barnardo*, *Gossage's* case, 1890, 24 Q. B. D. 283). The order for the issue of the writ in such cases is an order within the meaning of sec. 19 of the Judicature Act, 1873, and an appeal therefore lies from it to the Court of Appeal (see *Barnardo* v. *Ford*, [1892] App. Cas. (H. L.) 326), but no Court of Appeal ought lightly to interfere with the issue of the writ (see per Lord Herschell, *ibid.* at p. 339).

It has also been held that an appeal lies to the Court of Appeal against an order for an attachment for disobedience to a writ of *habeas corpus* (see *R.* v. *Barnardo*, *Tye's* case, 1889, 23 Q. B. D. 305).

The right of appeal without leave of the judge or of the Court of Appeal from any interlocutory order or interlocutory judgment made or given by a judge in cases where the liberty of the subject or the custody of infants is concerned, is expressly reserved by the Supreme Court of Judicature (Procedure) Act, 1894, 57 & 58 Vict. c. 16, s. 1 (*b*) (*i*); see also *Ex parte Emerson*, 1895, 11 T. L. R. 218.

Costs.—It was formerly held that the Court had no jurisdiction to order costs in cases of *habeas corpus*, though there was always power to award an officer obeying the writ the expenses of bringing up the prisoner (see *In re Dodd*, 1857, 2 De G. & J. 510; see also *In re Cobbett*, 1845, 14 Mee. & W. 175).

In recent practice, however, costs have frequently been awarded by judges at chambers in cases relating to the custody of infants (see Short and Mellor, *Cr. Of. Pr.* p. 364; see also *Ex parte Child*, 1854, 15 C. B. 238).

It is now clear that under sec. 5 of the Judicature Act, 1890, 36 & 37 Vict. c. 66, the Court has power when granting an application for a writ of *habeas corpus* to order payment by the defendant of the costs of the successful party (see *R.* v. *Jones*, [1894] 2 Q. B. 382). But there is no jurisdiction to grant costs against a person who is not on the record (see *In re Carter*, 1893, 95 L. T. 37).

As to the costs on appeal in cases of *habeas corpus*, see *Ex parte Bell Cox*, 1887, 57 L. J. Q. B. at p. 113.

Other Kinds of Writs of Habeas Corpus still in Use.—In addition to the writ of *habeas corpus ad subjiciendum*, which has been briefly discussed, and which, as stated above, is by far the most important of the writs of *habeas corpus*, several other kinds of writs of *habeas corpus* may still be issued from the Crown side of the Queen's Bench Division for different purposes. The writs in present use are, *habeas corpus ad testificandum*, *habeas corpus ad respondendum*, *habeas corpus ad deliberandum* and *recipias*, and *habeas corpus* to bring in the body of a defendant

on a return of *cepi corpus* (see Short and Mellor, *Cr. Of. Pr.* p. 335). But these writs are rarely resorted to, as alternative procedure is in some cases available.

Habeas Corpus ad testificandum.—This writ lies at common law for the purpose of bringing up a witness who is detained in prison to give evidence. The Habeas Corpus Act, 1803, 43 Geo. III. c. 140, enables judges of the High Court to award writs of *habeas corpus* for bringing up prisoners detained in custody under civil or criminal process before courts-martial and certain commissioners mentioned in the Act to give evidence. The Habeas Corpus Act, 1804, 44 Geo. III. c. 102, empowers any judge of the High Court at his discretion to award writs of *habeas corpus* for bringing up prisoners before any Court of record in England or Ireland to be examined as witnesses. The Arbitration Act, 1889, 52 & 53 Vict. c. 49, s. 18 (2), enables the Court or a judge to order a writ of *habeas corpus ad testificandum* to issue to bring up a prisoner for examination before an official or special referee, or before any arbitrator or umpire.

Under the Criminal Procedure Act, 1853, 16 & 17 Vict. c. 30, s. 9, a Secretary of State or judge of the Queen's Bench Division can, upon application by affidavit, issue a warrant or order to bring up any prisoner in gaol under any sentence or commitment (except under civil process) to be examined as a witness. This power is extended to County Court judges by the County Courts Act, 1888, 51 & 52 Vict. c. 43, s. 112.

This procedure, as being more convenient, is now, therefore, usually used in lieu of the writ of *habeas corpus ad testificandum*, but the writ must still be resorted to when the prisoner, whose evidence is required, is in gaol under process in any civil matter.

Application for the writ must be made on affidavit to a judge at chambers (see C. O. R. 1886, r. 246; for form of writ, see *ibid.* Form No. 183; see also as to the practice, *Jenks* v. *Ditton*, 1897, W. N. 56).

Habeas Corpus ad respondendum.—This writ was formerly issued where one person had a cause of action against another who was confined in gaol under the process of some inferior Court, so as to remove the prisoner, in order to charge him with the new cause of action in the superior Court (see Black. *Com.* bk. iii. ch. viii.; Bacon, *Abr.* tit. *Habeas Corpus* (A)). The writ may still be used for the purpose of bringing up prisoners detained in custody under civil or criminal process before magistrates or Courts of record for trial or examination on any other charge (see Short and Mellor, *Cr. Of. Pr.* p. 368; Short, *Cr. Of. Rules*, p. 111; see also the Habeas Corpus Act, 1803, 43 Geo. III. c. 140; *Ex parte Griffiths*, 1822, 5 Barn. & Ald. 730; *R.* v. *Day*, 1862, 3 F. & F. 526).

Application for a writ of *habeas corpus ad respondendum* must be made on affidavit to a judge at chambers (C. O. R. 1886, r. 246; for form of writ, see *ibid.* Forms No. 187 and No. 188).

Under the Criminal Law Amendment Act, 1867, 30 & 31 Vict. c. 35, s. 10, persons who are in custody and also under recognisances to come up for trial for any criminal offence may be brought up on an indictment by order without the necessity for a writ of *habeas corpus*.

Habeas Corpus ad deliberandum and recipias.—These writs are used to remove prisoners from one custody to another for the purpose of trial.

Though the removal of any subject of this realm who is committed to any prison or in custody of any officer for any criminal matter, except

by *habeas corpus* or other legal writ, or in certain specified cases of necessity, is forbidden by the Habeas Corpus Act, 1679, s. 9, various modern statutes have enabled prisoners to be removed from one custody to another for different purposes (see, for example, the Central Criminal Court Act, 1856, 19 & 20 Vict. c. 16, s. 5; Prisons Act, 1865, 28 & 29 Vict. c. 126, ss. 63, 64, and 65; Criminal Law Amendment Act, 1867, 30 & 31 Vict. c. 35, s. 10; Prisons Act, 1877, 40 & 41 Vict. c. 21, s. 28). The necessity for the issue of the writs of *habeas corpus ad deliberandum* and *recipias* is thus in many cases obviated.

Under the Counties of Cities Act, 1798, 38 Geo. III. c. 52, s. 3, indictments found by a grand jury of any city or town corporate, or inquisitions taken before the coroner, may be ordered by any Court of oyer and terminer or general gaol delivery for the county or city, to be filed with the proper officer of the next adjoining county, and the defendants removed by writ of *habeas corpus* issued by the said Court. By sec. 4 the judges of the King's Bench or justices of oyer and terminer or general gaol delivery are authorised to cause persons in custody for offences committed within the county of any city or town corporate to be removed by proper writs of *habeas corpus* into the custody of the sheriff of the next adjoining county for trial. As to applications for the writs under this statute, see Short and Mellor, *Cr. Of. Pr.* p. 371.

Application for writs of *habeas corpus ad deliberandum* and *recipias* must be made on affidavit to a judge at chambers (see C. O. R. 1886, r. 246). The application must be for two writs, the writ *ad deliberandum* to the gaoler to deliver the prisoner, and the writ *recipias* to the other gaoler to receive him (see *ibid.* r. 248; for forms of the writs, see *ibid.* Forms No. 185 and No. 186).

Habeas Corpus on return of Cepi Corpus.—This writ is in use where an attachment has been obtained against a prisoner in gaol. By means of the writ the prisoner is brought before the Court or before a judge at chambers, and there charged with the writ of attachment (see ATTACHMENT; CONTEMPT OF COURT).

But where the prisoner has been committed to prison by the Court, instead of issuing the writ of *habeas corpus* an order of course may be obtained at the Crown Office directing the prisoner to be brought before the Court (see C. O. R. 1886, r. 252 (*f*); see also Short and Mellor, *Cr. Of. Pr.* p. 411).

The writ is obtained on motion by counsel in Court, founded on affidavit. The Crown Office Rules, 1886, provide that if the sheriff returns *cepi corpus* to a writ of attachment for contempt, on an application at the Crown Office an order must be drawn up for a writ of *habeas corpus* to issue to bring in the body of the defendant (r. 263). For form of affidavit for *habeas corpus* to bring up a prisoner to be charged with attachment, see C. O. R. 1886, Form No. 191; and for form of writ of *habeas corpus* on return of *cepi corpus*, *ibid.* Form No. 192.

Habitual Criminal.—There are many enactments in the statute-book increasing the punishment of crimes tried under the Summary Jurisdiction Acts, in the event of a second or subsequent offence (see 52 & 53 Vict. c. 21, s. 4). Where the punishment on a second conviction exceeds three months' imprisonment, the accused can, as a general rule, elect to be tried on indictment (1879, c. 49, s. 17); but in some cases the enactments make the

offence indictable on a second or third conviction (see GAME LAWS, *Poaching*); and the jurisdiction of justices to try an indictable offence summarily cannot be exercised if there is legal proof before the Court of a previous conviction, the effect of which is to render the offender liable to penal servitude on a subsequent conviction (1879, c. 49, s. 14).

In the case of some indictable offences, the commission of a subsequent offence after a previous conviction entails liability to severer punishment—

(*a*) Simple larceny after previous conviction for felony, or an indictable misdemeanour, or two summary convictions for certain offences (24 & 25 Vict. c. 96, ss. 7, 8, 9);

(*b*) Any felony after a previous conviction for felony (7 & 8 Geo. IV. c. 28, s. 11; 54 & 55 Vict. c. 69, s. 1);

(*c*) Uttering base coin after a previous conviction for the same offence (24 & 25 Vict. c. 99, s. 10; *R.* v. *Blaby*, [1894] 2 Q. B. 170).

Courts have power to order offenders to be subject to police supervision where they are convicted on indictment of "crime," *i.e.*—

(*a*) Felony, (*b*) uttering false or counterfeit coin, (*c*) obtaining goods or money by false pretences (24 & 25 Vict. c. 96, ss. 88–90), (*d*) conspiracy to defraud, (*e*) being armed with intent to break into a dwelling-house in the night (24 & 25 Vict. c. 96, s. 58), and have been previously convicted of any of these crimes.

The supervision under secs. 5, 8 of the Act of 1871, as amended by sec. 2 of the Act of 1879 (42 & 43 Vict. c. 55), and extended by the Penal Servitude Act, 1891 (54 & 55 Vict. c. 69, s. 4), requires the offender, after the expiration of his sentence or while at large on licence or ticket of leave, to report himself to the police. And by secs. 7, 17 of the Act of 1871, as modified by sec. 6 of the Act of 1891, offenders twice convicted are subjected to summary punishment if convicted a third time within seven years of the expiration of a sentence of imprisonment, or seven years from release on licence from penal servitude or the expiration of the sentence. And where a man on ticket of leave or licence is convicted again he is liable to be sent back to penal servitude to serve his original sentence in addition to the new sentence (27 & 28 Vict. c. 47, s. 9; *R.* v. *King*, [1897] 1 Q. B. 214, at 217). Provision is made for photographing, measuring, and registering criminals by the Acts of 1871, s. 6, and 1891, s. 8, and regulations made in 1877 (St. R. & O., Rev., vol. v. p. 657) and 1896 (St. R. & O. 1896, No. 762).

In the case of a woman twice convicted of "crime," special power is given under sec. 14 of the Act of 1871 to send to an industrial school children under her care or control, and under fourteen, without means of subsistence or proper guardianship.

The indictment for an offence after a previous conviction, to warrant the increased sentence must contain a count setting out the fact of the previous conviction. The accused is first arraigned for the subsequent offence, and if he pleads or is found guilty he is arraigned as to the subsequent offence, and unless he pleads guilty the jury are required to find the fact. The evidence is production of a certificate of the conviction, and identification of the accused with the person named (7 & 8 Geo. IV. c. 28, s. 11; 6 & 7 Will. IV. c. 111; 24 & 25 Vict. c. 96, s. 116; c. 99, s. 37; 34 & 35 Vict. c. 112, ss. 9, 18; Archbold, *Cr. Pl.*, 21st ed., 162).

Habitual Drunkard.—Provision was made for the sequestering of habitual drunkards in licensed retreats by the Habitual Drunkards Act, 1879, 42 & 43 Vict. c. 19. That statute—which was passed for ten years

only—was made perpetual by the Inebriates Act, 1888, 51 & 52 Vict. c. 19, and it was provided (s. 5, Act of 1888) that both statutes should be cited as THE INEBRIATES ACTS, 1879 and 1888. The definition of "habitual drunkard" for the purposes of those Acts and the law as to licensed retreats is therefore discussed under the heading INEBRIATES ACTS. As to the detention of habitual drunkards convicted of cruelty to children, see CRUELTY *to Children*, vol. iv. at p. 55. See also DRUNKENNESS.

Hackney Carriage.—See CAB: EXCISE.

Hair Goods.—1. Factories for the making of hair goods are textile factories within the Factory Act, 1878 (41 & 42 Vict. c. 16, s. 93). The provisions of the Act prohibiting the taking of meals in certain parts of factories (s. 39) have been extended by Home Office Order of 20th December 1882 to those parts of such a factory in which hair goods are sorted or dusted (St. R. & O., Revised, vol. iii. p. 217).

2. Malicious damage to hair goods in process of manufacture is a felony within sec. 14 of the Malicious Damage Act, 1861, and punishable by penal servitude for life, or not less than three years, or by imprisonment with or without hard labour for not over two years (34 & 35 Vict. c. 69, s. 1). The offence is not triable at Quarter Sessions (5 & 6 Vict. c. 38, s. 1).

Half Blood.—See AFFINITY; BLOOD RELATION; CONSANGUINITY; DISTRIBUTIONS, STATUTE OF; INHERITANCE.

Hallamshire.—See TRADE MARKS.

Hall Marks.—See PLATE.

Hamefare.—See BURGLARY, vol. ii. p. 304.

Hamesocn.—See BURGLARY, vol. ii. p. 304.

Handwriting may be proved as follows:—

1. The writer himself may be called to prove his writing.

2. A witness who saw the writing in question written may be called. In the case of documents to the validity of which attestation is requisite (such as wills and bills of sale), the execution must be proved by one (or more) of the attesting witnesses, unless they are dead or cannot be produced, in which case it is sufficient to prove the signature of one of them to the attesting clause (see 17 & 18 Vict. c. 125, s. 6; 28 & 29 Vict. c. 18, s. 7; *Wright* v. *Doe*, 1834, 1 Ad. & E. 3, 23).

3. By calling a witness who knows the handwriting of the writer either from having seen him write (*Garrells* v. *Alexander*, 1801, 4 Esp. 37), or from having corresponded with him or otherwise become acquainted

with his handwriting (*Doe* v. *Suckermore*, 1836, 5 Ad. & E. 703, 730, 740; *Smith* v. *Sainsbury*, 1832, 5 Car. & P. 196).

4. By comparison (by a witness) of the disputed writing with any writing proved *to the satisfaction of a judge* to be genuine (17 & 18 Vict. c. 125, s. 27, as to civil cases; 28 & 29 Vict. c. 18, s. 8, as to criminal cases; and see *Cresswell* v. *Jackson*, 1860, 2 F. & F. 24; *Cobbett* v. *Kilminster*, 1865, 4 F. & F. 490).

No proof is required of the signatures of the judges of the Supreme Court appended or attached to any decree, order, certificate, or other judicial or official document (8 & 9 Vict. c. 113, s. 2), or of those of the judge and registrars in bankruptcy (46 & 47 Vict. c. 52, s. 137), or of commissioners of oaths and other persons empowered to administer oaths (52 Vict. c. 10, s. 6; 54 & 55 Vict. c. 50, s. 2), or of the signatures of persons before whom examinations, affidavits, acknowledgments, or other documents are taken in Scotland, Ireland, the Channel Islands, colonies, and foreign parts, in accordance with Order 38, r. 6.

Signatures to official and public documents and signatures to certified copies of public documents need not in general be proved (8 & 9 Vict. c. 113, s. 1; 14 & 15 Vict. c. 99, s. 14).

Hanging Signs.—The dedication of a highway, even if it has become a street, does not at common law affect the right of the adjoining owners or occupiers to project buildings or signs over the street, provided that they do not obstruct free passage, and provided that they are kept in repair so as not to fall and injure passengers (*Tarry* v. *Ashton*, 1876, 1 Q. B. D. 314; *Morgan* v. *Hart*, 1888, *Times*, Nov. 27), since the highway authorities' powers extend only to the maintenance of the way and preservation of the free passage (see *Wandsworth District Board of Works* v. *United Kingdom Telephone Co.*, 1884, 13 Q. B. D. 904; *Tunbridge Wells* (*Mayor, etc.*) v. *Baird*, [1896] App. Cas. 454). And under secs. 69, 70 of the Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34), the authorities may require and compel the removal of any sign, or sign iron (erected or placed after the passing of any special Act or the general Act which incorporates the clauses), which obstructs safe and convenient passage along a street in an urban district. The sections are incorporated with the Public Health Act, 1875 (38 & 39 Vict. c. 55, s. 160).

Power has been given by numerous local Acts to local authorities to remove or regulate hanging signs which project over streets (*Bouverie* v. *Miles*, 1830, 1 Barn. & Adol. 31; *Goldstraw* v. *Duckworth*, 1880, 5 Q. B. D. 275; *A.-G.* v. *Hooper*, [1893] 3 Ch. 483). There are no general provisions in the Public Health Acts, 1875 and 1890, on the subject; nor do the powers of by-laws as to buildings appear wide enough to include the regulation of hanging signs. But the Act of 1875, sec. 171, incorporates sec. 28 of the Towns Police Clauses Act, 1847 (10 & 11 Vict. c. 89), whereby it is an offence punishable summarily to place projections over a footway being part of the street at a level less than 8 feet above the ground, or so as to obstruct or incommode passengers (*R.* v. *Young*, 1882, 52 L. J. M. C. 55; *Leicester* (*Mayor, etc.*) v. *Holland*, 1888, 57 L. J. M. C. 75).

In the metropolis such projections may contravene Michaelangelo Taylor's Act (57 Geo. III. c. xxix. s. 65) and sundry local improvement Acts (*Wyatt* v. *Gems*, [1893] 2 Q. B. 225); and also sec. 60 of the Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), under which a magistrate if satisfied that the board is calculated to obstruct is not required to hear evidence

that it did or did not in fact obstruct (*Read* v. *Perrett*, 1876, 1 Ex. D. 349). The owners of projections can be required and compelled to remove them, if the magistrate is satisfied that they cause annoyance or obstruction, under sec. 119 of the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), which supersedes sec. 72 of Michaelangelo Taylor's Act (*Gabriel* v. *St. James Westminster Vestry*, 1859, 23 J. P. 372; *Fortescue* v. *Bethnal Green Vestry*, [1891] 2 Q. B. 170). And under sec. 164 of the London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), the London County Council is empowered to make by-laws for the regulation (except in the city of London) of lamps, signs, and other structures overhanging the public way, which when made are to be administered by the local authority. This power has not yet been exercised, but steps have been taken with a view to its exercise. It is additional to the regulations of the Building Act as to structural projections (s. 73).

The law as to sign-posts is different. They are a nuisance unless it can be shown that the way was dedicated subject to them (*Hoare* v. *Metropolitan Board of Works*, 1874, L. R. 9 Q. B. 296).

[*Authority.*—Emden on *Building*, 3rd ed.]

Hansa.—See Hanseatic Laws of the Sea.

Hanseatic Laws of the Sea.—These were collected into a code promulgated by the League in 1591, and revised in 1614. They formed the maritime law of the Hanse towns, and enjoyed authority throughout Northern Europe wherever the Hansa influence had penetrated. Reddie gives the Hanseatic code high praise as the, till its time, best digested collection of the rules of private law affecting maritime commerce. They are, he says, "of such a general, common, and similar nature as to be applicable to intercourse between the individual inhabitants of different independent countries when at peace with each other, as well as between individuals of one and the same nation. And to this extent the compilation may be viewed as a body of international law for the maritime intercourse of independent nations during peace." See a French translation and commentary in Cleirac's *Us et Coutumes de la Mer*, p. 166; and an English translated abstract in Justice's *Sea Laws*, p. 249.

[*Authorities.*—Kuricke, *Jus maritimum hanseaticum*, 1657; A. Justice, *A General Treatise of the Dominion and Laws of the Sea*, London, 1705; Cleirac, *Us et Coutumes de la Mer* [1647, 1661], Rouen, 1671; Reddie, *Researches Historical and Critical in Maritime International Law*, Edinburgh, 1844, vol. ii. p. 57; Pardessus, *Collection des lois maritimes antérieurs au 18e siècle*, Paris, 1829–45.]

Harbinger.—See Knight Harbinger.

Harbouring—

Constable.—It is an offence, punishable on summary conviction, for a person licensed under the Licensing Acts knowingly to harbour a constable, or knowingly to allow him to remain on the premises while on duty, except to restore order or execute his duty (35 & 36 Vict. c. 94, s. 16). The offence is not committed if the person *bonâ fide* believes the constable to be off duty (*Sherras* v. *de Rutzen*, [1895] 1 Q. B. 918). The

master is liable under the section, if his servant knowingly breaks the section (*Matheson* v. *Collens*, 1874, L. R. 9 Q. B. 292).

Felons.—1. A person, other than the wife of a felon, who harbours him with a view to his concealment from justice, is an accessory after the fact to the felony. See ACCESSORY.

2. The lodging or harbouring of thieves or reputed thieves, or permitting their meeting or assembly, is summarily punishable when it is knowingly done (1) by the occupier or keeper of a lodging-house, or a place where intoxicating liquors are sold, or place of public entertainment or resort (34 & 35 Vict. c. 112, s. 10); (2) by the occupier or keeper of a brothel (s. 11). The penalty is a fine not exceeding £10, or in default, imprisonment for not exceeding four months (ss. 10, 11), and to enter into recognisances for keeping the peace or good behaviour, with or without sureties, in a sum not exceeding £20, or in default to a further imprisonment not exceeding three months (ss. 10, 11); and in the case of the occupier or keeper being the holder of a licence to sell liquors, or for music or dancing, the licence is forfeited (s. 10). Failure to produce the licence entails a penalty (s. 10). The licensee has an appeal as for an offence under the Alehouse Act, 1828 (9 Geo. IV. c. 31).

These provisions extend also to allowing thieves, or reputed thieves, to deposit goods on the premises, with reasonable cause for believing them to be stolen. A chief officer of police can give a written authority to enter such houses to search for stolen goods, if there has been a conviction of an occupier within twelve months for harbouring thieves or receiving stolen property (s. 16).

3. There are no accessories after the fact in misdemeanour, but the harbouring of a misdemeanant may be evidence of a conspiracy to defeat or pervert justice.

Prostitutes.—See PROSTITUTE.

Thieves.—See HARBOURING *Felons.*

Harbours.—Harbours are "places (whether artificial or natural) to shelter ships from the violence of the sea, and where ships are brought for commercial purposes to load and unload goods (and passengers), and quays are a necessary part of them" (Lord Esher, *R.* v. *Hannam*, 1886, 2 T. L. R. 234). They are thus equivalent to ports (*q.v.*) or havens (*q.v.*), and the terms may be considered interchangeable (see 54 Geo. III. c. 159, s. 14). They are generally owned or controlled by Boards or Commissioners appointed for that purpose and furnished with powers by special Acts of Parliament, supplemented by embodying the provisions of the General Harbours, Docks, and Piers Clauses Act, 1847.

Harbour authorities are generally empowered to charge dues on ships and goods using the harbour, in order to maintain the harbour in a proper condition; but whether they take dues or not, the owners of a harbour are liable to ships using the harbour for its proper condition (*R.* v. *Williams*, 1884, 9 App. Cas. 418, harbour belonging to the New Zealand Government). They are also liable for the acts of their officials, *e.g.* the harbour-master, and accordingly must make compensation for any injury resulting from his negligence to the property of other persons, *e.g.* a ship grounding while being navigated under the harbour-master's orders (*The*

Apollo, [1891] App. Cas. 499; *Reney* v. *Magistrates of Kirkcudbright*, 1892, 7 Asp. 221); or a ship being put by the harbour-master's directions in a berth, the bottom of which was uneven and did her damage (*The Burlington*, 1895, 8 Asp. 10 and 38); or a ship taking the ground owing to her not being able to pass up the channel before the tide fell because she was obstructed by a tug chartered to a harbour authority and engaged in towing barges up the channel just ahead of the ship (*The Ratata*, 1897, 8 Asp. 236). But a harbour authority is not liable for an act of one of its officials which is beyond the scope of his duty, and the powers of the authority itself (*Shaw, Savill, Albion Co.* v. *Timaru Local Board*, 1890, 15 App. Cas. 429, harbour-master acting as a pilot). And in a Queen's harbour or dockyard port the principle of *respondeat superior* does not prevail, and the official in charge of it, or Queen's harbour-master, does not make the Crown liable for his acts, nor is he liable for the defaults of his subordinates, but he may make himself liable by inviting a ship to go to a particular place where she suffers damage (*Wright* v. *Lethbridge*, 1890, 63 L. T. 572; see PORT (DOCKYARD) and DOCKMASTER).

Harbour authorities generally have power to make by-laws and regulations with respect to the navigation of their harbours given them by their local Act, *e.g.* the Mersey or Humber Rules. Such rules "concerning lights and signals to be carried or the steps for avoiding collision to be taken by vessels navigating the waters of any harbour, river, or other inland navigation have full effect"; and where any such rules are not and cannot be made, they may be made by Order in Council on the application of any person having authority over such waters; or if there is no such person, any person interested in the navigation thereof; and these rules shall, as regards vessels navigating those waters, be of the same force as if they were part of the collision regulations (M. S. A. 1894, s. 421; see COLLISIONS AT SEA). Such local rules of navigation prevail over the general collision regulations in the local waters (*The Winstanley*, 1896, 8 Asp. 170).

The general powers and liabilities of harbour authorities are contained in the Harbours, Docks, and Piers Clauses Act, 1847; but to make the provisions of this Act apply, it must be expressly incorporated into the special Acts which authorise harbour works being done. The following is a summary of the principal provisions of the Act.

It gives general powers relating to the construction of harbours, docks, and piers; thus for making any works the authority of the Board of Trade is required (s. 12), and the quays must be approved by the Treasury and Customs. It provides for accommodation being furnished for custom-house officers, a supply of lifeboats, tide gauges, the building of warehouses and cranes, the taking of rates from ships, and collecting and accounting for them; and that on payment of rates the harbour is to be open to all persons for shipping and unshipping of goods and the embarking and landing of passengers (s. 33). A harbour-master may be appointed, whose powers extend to regulating the time and manner in which any ship is to enter, leave, and lie in or at the harbour within the limits prescribed for it, and in which she shall be placed, moored, unmoored, and removed there; he can also regulate the position in which any vessel shall load or discharge her cargo, passengers, or ballast, as also the manner in which any vessel entering the harbour shall be dismantled as well for her own safety as for preventing injury to other vessels and the harbour. He can also remove unserviceable vessels and other obstructions from the harbour and keep it clear, and regulate the quantity of ballast or dead weight

in the hold which each vessel in or at the harbour shall have during the delivery of her cargo or after its discharge, provided that he does not act in any way contrary to the Customs regulations (s. 52). His orders must be obeyed by masters of ships, under a penalty of £5 (s. 53). For misbehaviour in the exercise of his authority the harbour-master is liable to a fine of £5. Any person offering bribes to him or to any officer employed in or about the harbour, is liable to a penalty of £20 (ss. 54 and 55). Unserviceable vessels may be removed from the harbour by him at their owner's expense; and vessels in the harbour or docks may be moored and unmoored, placed and removed by him as he thinks fit (ss. 57 and 58). Vessels entering the harbour may be dismantled as he directs; they must have their sails lowered when navigating in a dock, and must have hawsers fixed to moorings when required by him; they must not lie near the entrance of the harbour without his permission, and they may be removed for the purpose of repairing the harbour or docks by the harbour-master if their masters refuse to do so (s. 65).

The Act further provides for the discharge of cargoes and the removal of goods; and also for the protection of the harbour and vessels therein from fire and other injury: thus all combustible matters on quays, docks, and wharves must be removed to a place of safety by their owner, or if they remain there they must be guarded during the night at their owner's expense. For regulations as to conveyance, loading, and storing of dangerous goods, see DANGEROUS GOODS; EXPLOSIVES; PETROLEUM. Certain acts, such as boiling or heating pitch oil, etc., in a harbour except at a properly allowed time and place, or lighting a fire, candle, or lamp in a vessel in the harbour except with the harbour-master's permission, or in the docks or works, or bringing a loaded gun on to the quays or works of the harbour, or having or allowing to remain any loaded gun in any vessel in the harbour, or bringing gunpowder or allowing it to remain on the quays or works of the harbour, or in the dock, or on the pier, or in any vessel there, are offences punishable by fine of £10 (s. 71). The harbour-master may also enter any vessel in the harbour in order to search for any such light and fire, and may extinguish it, and anyone obstructing him in so doing is liable to a fine of £10 (s. 72). In this connection it may be noticed that the offence of setting fire to any buildings belonging to a harbour is a felony punishable with penal servitude for life, or not less than five years, or imprisonment for two years with or without hard labour, and if by a male under sixteen, with or without whipping, at the discretion of the Court (1861, 24 & 25 Vict. c. 97, s. 4).

The protection of the harbour works is also safeguarded thus by sec. 74: "The owner of every vessel or float of timber shall be answerable to the undertakers (*i.e.* harbour authority) for any damage done by such vessel or float of timber, or by any person employed about the same, to the harbour, dock, or pier, or the quay or works connected therewith; and the master or person having the charge of such vessel or float of timber through whose wilful act or negligence any such damage is done, shall also be liable to make good the same; and the undertakers may detain any such vessel or float of timber until sufficient security has been given for the amount of damage done by the same; if such damage does not exceed £50, it may be recovered before two justices, who may cause the vessel or float, or any tackle or furniture of it, to be kept till the damages are paid, and in default of payment may order it to be sold to satisfy the damage and expenses (s. 75); and the owner may recover for such damage from his servants" (s. 76). Under sec. 74 it has been held that an owner of a ship which did

damage to harbour works, though this was due to inevitable accident, viz. stress of weather, and not to any default of those in charge of her at the time, is liable to make good such damage (*Dennis* v. *Torell*, 1872, L. R. 8 Q. B. 10). It has, however, under this section, been held (though with much hesitation) by the House of Lords, that where damage was done to a pier by a vessel through the violence of the winds and waves, at a time when the master and crew had been obliged to escape from the vessel, and had consequently no control over it, the owners were not liable, for they would not be liable for damage caused by an act of God at common law, and the section did not in express terms impose a greater liability on them (*River Wear Commissioners* v. *Adamson*, 1877, 2 App. Cas. 743); but in a recent case the House of Lords has decided that no principle can be extracted from this decision, and that under an earlier section of this Act relating to a sunken ship (s. 56, see *post*), the liability of a shipowner is not the same as his liability at common law would be (*The Crystal*, [1894] App. Cas. 508, *post*). A ship which does damage to a breakwater or seawall is liable *in rem* (*The Uhla*, 1867, L. R. Ad. & Ec. 29 *n*; *The Excelsior*, 1868, L. R. 2 Ad. & Ec. 268); and so she is if she causes another ship to do so (*The Industrie*, 1871, L. R. 3 Ad. & Ec. 303). See COLLISIONS AT SEA; ADMIRALTY.

The Act also makes provision with regard to lighthouses, beacons, and buoys (see LIGHTHOUSE), and harbour and dock police (two special constables may be appointed by any two justices), and for meters and weighers (ss. 81 and 82).

The harbour authority may also make by-laws for all or any of these purposes, viz. regulating the use of the harbour; the exercise of the harbour-master's authority; the admission of vessels into the harbour and out of it; the good order and government of such vessels while in harbour; the shipping, unshipping, landing, warehousing, stowing, depositing, and removing of all goods in the harbour; the hours (with consent of the Customs Commissioners) during which the entrances or outlets to the harbour shall be open; the duties and conduct of all persons as well the servants of the harbour authority as others (not officers of Customs or Excise) employed in the harbour; the use of fires and lights in the harbour or in vessels therein; preventing damage or injury to any vessel or goods in the harbour; the use of the cranes, weighing machines, weights and measures, duties and conduct of weighers and meters employed by the authority; the duties and conduct of porters and carriers employed in the premises of the authority, and the pay payable to them for carrying any goods, articles, etc., there. A by-law of a harbour authority that no lumpers shall work in a dock, unless they were authorised by that authority, and that only servants of the authority could work there, was held void as beyond the power given by this section (*Dick* v. *Badart*, 1883, 10 Q. B. D. 387). Such by-laws may be altered from time to time, and enforced by penalties. No by-law is to come into force till confirmed, either as prescribed or by a judge of the High Court, or by Quarter Sessions; notice must be given of them to the papers a month beforehand, and a copy of the proposed by-laws must be open to inspection; when confirmed, they must be published by being printed, and by being put up conspicuously in the harbour. Such by-laws, if approved, bind all parties. For recovery of penalties and damages the Railway Clauses Consolidation Act, 1845, is incorporated into the Act and the special Act. A copy of the special Act must be kept by the authority at their office, and another copy deposited with the clerk of the peace for the county under penalty; and the rights of the Crown, Admiralty, Customs, Woods and Forests, Revenue Departments,

City of London, Trinity House, Port of Dublin, Commissioners of Northern Lights, or any lord of the manor in the particular harbour are all preserved.

Subsequent Acts increase the facilities for making harbour works. Persons who wish to avoid the expense of applying for a special Act may in cases where the estimated expenditure does not exceed £100,000 apply by memorial to the Board of Trade for a provisional order allowing them to execute the works required; subscribers to such a memorial are taken to be its promoters, and security may be taken from them for the Board's costs incurred in connection therewith. The rights of the Crown and the Duchy of Cornwall are saved, as also are the jurisdictions of the conservators of the Thames, Mersey, Clyde, Wear, Humber, and Tyne, and rights acquired by royal charter, prescription, and local or personal or private Acts for purposes connected with navigation. The Board may grant such provisional order, a copy of which must be deposited with the clerk of the peace for the county, and notice given by advertisement of such deposit; the Board must then obtain confirmation of such order by Act of Parliament (for until such confirmation the provisional order has no effect), and must report to Parliament every year their proceedings under this Act. The promoters of the undertaking may grant land situated in their works to the War Department to be used for the defence of the harbour (General Pier and Harbour Act, 1861 (24 & 25 Vict. c. 45)). The Harbours, Docks, and Piers Clauses Act, 1847, is incorporated in every provisional order. Plans for works authorised by provisional orders must be submitted to the Board of Trade for approval, who (*inter alia*) may survey the proposed works at the expense of the undertakers, and revise rates; such works while in construction must be properly lighted by night; and the works so authorised must be completed in five years (General Pier and Harbour Act, 1862 (25 & 26 Vict. c. 19)). The Passing Tolls Act, 1861 (24 & 25 Vict. c. 47), allows advances of money to be made to harbour authorities; passing tolls, tolls levied by charitable corporations, and differential dues are abolished; and town corporations may transfer shipping dues to harbour authorities, who may borrow money on their property and leviable rates to carry out such transfer. Harbour authorities have also power to borrow for the purpose of carrying out their works under various other statutes (1861, 24 & 25 Vict. c. 45, s. 47; 1862, 25 & 26 Vict. c. 69; 1863, 26 & 27 Vict. c. 81; 1866, 29 & 30 Vict. c. 30; 1875, 38 & 39 Vict. c. 89; and other statutes). They may also be licensed to have testing machines for chain cables and anchors (1864, 27 & 28 Vict. c. 27; 1871, 34 & 35 Vict. c. 101). The controlling authority for all harbour authorities is now the Board of Trade, instead of the Admiralty as formerly (1862, 25 & 26 Vict. c. 69; see BOARD OF TRADE); though the Admiralty may retain authority over harbours where royal dockyards are situated (*ibid.* s. 8). Before any pier, wharf, or jetty can be erected in or near a public harbour in the United Kingdom one month's notice must be given to the Board of Trade (1805, 46 Geo. III. c. 153).

Harbour authorities have also special facilities for keeping their harbours in good order and clear of obstructions. Statutory provision was made for harbours in Devon and Cornwall to guard against their being injured by deposits from tin workings near them (1531, 23 Hen. VIII. c. 8; 1535, 27 *ibid.* c. 23). For harbours in Isle of Man, see MAN, ISLE OF. No shingle or ballast may be removed from the shores or banks of any port, harbour, or haven, and no ballast or rubbish may be thrown into them (1814, 54 Geo. III. 159; *Nicholson* v. *Williams*, 1871, L. R. 6 Q. B. 632; see FORESHORE); nor is any obstruction to navigation allowed; and the act of discharging water containing solid matter in suspension into a tidal brook

which flows into a tidal river, which was carried down and deposited in the tidal river though not so as to obstruct the navigation of the river, is punishable by penalty (*United Alkali Co.* v. *Simpson*, [1894] 2 Q. B. 116). Power to remove wrecks which obstruct the navigation of the port was given in 1745 (19 Geo. II. c. 22); and is also contained in the Harbours, Docks, and Piers Clauses Act, 1847. The expenses of such removal, if made by the harbour authority, may be repaid by the wreck being detained till they are paid by its owners, or in default of such payment it can be sold, and the proceeds retained by the harbour authority; if they are not enough to meet the expenses, by the latter Act the owner is personally liable for the balance (*The Crystal*, [1894] App. Cas. 508); and the same power may exist under a local Act, *e.g.* the Aire and Calder Navigation Act, 1889 (*Barraclough* v. *Brown*, [1897] App. Cas. 615). Under both these latter statutes the "owner" of the wreck who is personally liable means the owner at the time that the expenses are incurred, so that if the shipowner has abandoned to his underwriters his liability ceases; and it seems that the underwriters who have paid for the loss, if they have exercised no acts of ownership over the wreck, do not become liable (*Eglinton* v. *Norman*, 1877, 3 Asp. 471, 473, 475, and 476, not touched as to this point by *The Crystal*, above). It, however, depends on the language of the Act applicable whether the owner of the wreck can rid himself of his liability in this way or not; and in Victoria under the Victorian Marine Act, it has been held that he cannot (*Smith* v. *Wilson*, [1896] App. Cas. 579, P. C.). Power to remove wrecks is also given to harbour authorities by the Wrecks Removal Act, 1877 (39 & 40 Vict. c. 16), and its amending Act, 1889 (52 & 53 Vict. c. 5),[1] though no personal remedy is given as in the earlier general Act; and so is power to light and buoy wrecks; and the harbour authority may be liable to any ship which is injured by their failure to perform this duty (*Dormont* v. *Furness R. C.*, 1883, 11 Q. B. D. 496); while the owners of the wreck, if they have abandoned her, will not be liable (*The Douglas*, 1882, 7 P. D. 151; *The Utopia*, [1893] App. Cas. 492). The power of detaining the proceeds of wreck removed or recovered generally extends to the cargo as well as the ship; but if the shipowner agrees with the harbour authority to pay the expenses of raising the ship, and the ship and cargo are recovered, he cannot detain the goods and claim repayment from the cargo owner (*The Ettrick*, 1881, 6 P. D. 127); and under the wording of the Mersey Act, 1858, empowering the Harbour Board to "raise, destroy, etc., any wrecks of vessels and any vessels sunk in the port which may be an obstruction to navigation, and if the master or owner of such vessel or obstruction shall neglect to pay the charge of removing the same, to sell the same, and out of the proceeds to retain expense of removal," it was held that the Harbour Board who had raised part of the cargo of a ship and had detained the ship and the rest of the cargo, had no lien on such cargo for their expenses (*Vivian* v. *Mersey Docks*, 1869, L. R. 5 C. P. 19).

Though a harbour authority is rateable in respect of its wharves and works, it is not rateable in respect of harbour dues for ships entering the harbour, if the soil of the harbour does not belong to it, and such dues cannot be added to the valuation of the wharves and quays unless these are the "sole meritorious cause" of the harbour dues (*R.* v. *Hull Dock Co.*, 1845, 7 Q. B. 2; *New Shoreham* v. *Lancing*, 1870, L. R. 5 Q. B. 489; *R.* v. *Berwick*, 1885, 16 Q. B. D. 493; *Blyth Harbour* v. *Newsham and South Blyth*, [1894] 2 Q. B. 293 and 675). The fact of renting from a Harbour Board a quay space and sheds for loading and discharging steamers, unless exclusive

[1] Now s. 530, M. S. A. 1894.

possession of them be given, does not make them rateable (*Inman* v. *West Derby Union*, 1874, L. R. 9 Q. B. 180). Harbour bonds, or bonds secured on harbour duties, and generally given to enable harbour works to be done, are not an interest in land under the Mortmain Act (which formerly would have been a void charitable gift, and is now only allowed to be a charitable bequest on condition of its being sold or saleable in a year), unless they are mortgages on property which includes land (*Martin* v. *Lacon*, 1885 and 1886, 30 Ch. D. 544, and 33 *ibid.* 332; *Buckley* v. *Royal National Lifeboat Institution*, 1889, 41 Ch. D. 168, and 43 *ibid.* 27).

Hard Labour.—See IMPRISONMENT; PRISON.

Hares.—See GAME LAWS.

Hat Money.—See PRIMAGE.

Hattisheriff, from the Arab *hatt* and *sherif*, noble, an order or decree with the executory words in the handwriting of the Sultan and signed by him, and therefore clothed with the highest authority.

Hat Works.—See FACTORIES AND WORKSHOPS.

Have.—In devises, the term "have" in such phrases as "have issue," "the lands which I have," means have at the date of the testator's death (cp. *Doe d. Burton* v. *White*, 1849, 18 L. J. Ex. 59; *Doe d. York* v. *Walker*, 1844, 12 Mee. & W. 591). *Semble*, the same interpretation holds good even when the phrase is "the lands which I *now* have" (cp. *Castle* v. *Fox*, 1871, L. R. 11 Eq. 542, and other cases cited in Stroud, *Jud. Dict.*). *Cole* v. *Scott*, 1850, 1 Mac. & G. 518, may be consulted *per contra*. See further the notes in Stroud, *ad loc.* to "have or convey," and "having."

Havens.—Hale defines a haven as "a part of the sea within certain necks or cinctures of land which are more safe than roads for the riding or anchoring of ships, whereby they are protected almost on every side from the violence of the winds, and not far off from the convenience of the port, as Milford Haven, Plymouth Haven, Falmouth Haven, and the like, whereof some are larger, some straiter, some purely made up by nature, some made or at least helped by art" (*First Treatise*; Moore, *Foreshore*, 367). For the law as to havens, see HARBOURS and PORT.

Hawkers and Pedlars, frequently classed with petty chapmen, tinkers, etc., are itinerant dealers who trade subject to certain statutory restrictions. As "walking pewterers," they bore a bad reputation (19 Hen. VII. c. 6), and were later described as "evil disposed persons" (25 Hen. VIII. c. 9, s. 6). Even at the present day, every petty chapman or pedlar wandering about and trading, without being duly licensed or otherwise authorised by law, may be proceeded against as "an idle and disorderly person" (5 Geo. IV.

c. 83, s. 3). They were first made to take out a licence in 1697 "for a further provision for payment of the interest of the transport debt for the reducing of Ireland" (8 & 9 Will. III. c. 25), and have ever since been more or less in touch with the revenue. Until 1871, they were dealt with under the same Acts, but in that year they were divided into two classes, viz. those trading with and those trading without a beast of burden, and the law relating to them has been consolidated by the Hawkers Act, 1888, and the Pedlars Acts, 1871 and 1881. Many of the cases decided upon the repealed Acts are, however, still applicable, the words upon which they were decided having been in effect re-enacted.

By the Hawkers Act, 1888 (51 & 52 Vict. c. 33), "hawker" means any person who travels with any beast bearing or drawing burden, and goes from place to place, or to other men's houses, carrying to sell, or exposing for sale, any goods, etc., or exposing samples or patterns of any goods, etc., to be afterwards delivered, and includes any person who travels by any means of locomotion to any place in which he does not usually reside or carry on business, and there sells or exposes for sale any goods, etc., in or at any place used by him for that purpose (s. 2). The section, subject to exemptions mentioned below, applies to a person who has his goods forwarded, and himself travels independently (*Dean* v. *King*, 1821, 4 Barn. & Ald. 517), even though it be to one place only (*Manson* v. *Hope*, 1862, 2 B. & S. 498), and there sells his goods through another (*A.-G.* v. *Woolhouse*, 1823, 12 Price, 65), or sells them on commission (*R.* v. *Turner*, 1821, 4 Barn. & Ald. 510), or as agent for another, though on one occasion only (*Manson* v. *Hope*, *ubi supra*); but the isolated sale of a single article to a particular person is not necessarily a hawking (*R.* v. *Little*, 1758, 1 Burr. 609). Barter is equivalent to sale (*Druce* v. *Gabb*, 1858, 6 W. R. 497).

Every hawker must take out, in his own name (s. 5, subs. 4), a £2 excise licence, which expires on the 31st March in each year (s. 3, subss. 1, 2), and is personal, except that a servant may trade with his master's licence for his master's benefit (s. 5, subs. 2). Under his licence, a hawker may travel with more than one beast (*R.* v. *Robotham*, 1764, 3 Burr. 1472).

A licence is not required (s. 3, subs. 3) by any person—

(1) Selling or seeking orders for goods, etc., to or from persons who are dealers therein, and who buy to sell again;

(2) Who is the real worker or maker of any goods, etc., and his children, apprentices, and servants usually residing in the same house with him, selling or seeking orders for goods, etc., made by him. This exemption includes cases where a master, without taking any manual share in the work, manufactures goods by persons in his employment (*R.* v. *Faraday*, 1830, 1 Barn. & Adol. 275), and, apparently, a sale by a servant under the direct personal supervision of such maker would come within the exemption (*ibid.*). "Residing" imports the place where the party sleeps (*R.* v. *Mainwaring*, 1829, 10 Barn. & Cress. 66);

(3) Selling fish, fruit, victuals (as to which, see *R.* v. *Hodgkinson*, 1829, 10 Barn. & Cress. 74, and cases there cited), or coal;

(4) Selling or exposing for sale goods, etc., in any public market or fair legally established. This exemption does not apply to a merely *de facto* market, *e.g.* one held on a day other than the day named in the grant by which it was created (*Benjamin* v. *Andrews*, 1858, C. B. N. S. 299; see MARKETS AND FAIRS).

The above exemptions only apply to taking out a licence, and do not entitle a licensed hawker to trade in a place contrary to the by-laws there

in force (*Simson* v. *Moss*, 1831, 2 Barn. & Adol. 543; *Openshaw* v. *Oakeley*, 1889, 60 L. T. 929).

Except by way of renewal, a licence will only be granted on the production of a certificate of good character and fitness, signed by the clergyman or minister and two householders of the parish or place where the applicant resides, or by a justice for the county or place, or chief officer of police for the district wherein the Inland Revenue officer to whom application is made resides (s. 4, subs. 1).

Besides having a licence, a hawker must keep his name and the words "licensed hawker" visibly inscribed upon every package and vehicle used for the carriage of his goods, and upon every room or shop in which they are sold, and upon every handbill or advertisement which he distributes or publishes (s. 5, subs. 1).

A fine of £50 and forfeiture of the licence is incurred by any person who forges a certificate for obtaining a licence, or who knowingly produces or makes use of any forged certificate or licence (s. 4, subs. 2). And a fine of £10 for each offence is incurred by any person who—

(1) Being a hawker, does not observe the provisions as to exhibiting his name, etc., or who lets or lends his licence to anyone other than his servant trading for his benefit (s. 5, subss. 1–3);

(2) Not having in force a proper licence, uses words importing that he carries on the trade of a hawker, or is licensed so to do; or trades with a licence granted to any person other than his master (s. 5, subs. 4);

(3) Trades as a hawker without having, or without producing upon demand by any person, a proper licence in force granted to him or his master (s. 6, subs. 1). In either of these cases an offender is further liable to be arrested by any Inland Revenue officer or officer of the peace, and conveyed before a justice to be summarily dealt with (*ibid.* subs. 3). Moreover, any person licensed to carry on any trade, or to sell goods, is liable to a penalty of £20 if he does not produce and deliver his licence within a reasonable time to an officer of excise demanding it (6 Geo. IV. c. 81, s. 28). Penalties are also incurred by persons carrying about for sale tobacco (5 & 6 Vict. c. 93, s. 13), explosive substances (38 & 39 Vict. c. 17, s. 30), spirits (43 & 44 Vict. c. 24, s. 146, subss. 1, 4), petroleum (44 & 45 Vict. c. 67, Petroleum Hawkers Act, 1881), and stamps (54 & 55 Vict. c. 38, ss. 6, 7), contrary to the regulations imposed by the statutes. A special licence is required for hawking or peddling plate (30 & 31 Vict. c. 90, ss. 1, 17; 51 & 52 Vict. c. 8, s. 9, subs. 2; cp. *Killick* v. *Graham*, [1896] 2 Q. B. 196).

By the Pedlars Act, 1871 (34 & 35 Vict. c. 96), "pedlar" means any person who, without any beast bearing or drawing burden, travels and trades on foot, and goes from town to town, or to other men's houses, carrying to sell, or exposing for sale, any goods, etc., or procuring orders for goods, etc., immediately to be delivered, or selling or offering for sale his skill in handicraft (s. 3). To carry about a missionary basket and sell the contents for the benefit of a charity, is not trading within the section (*Gregg* v. *Smith*, 1873, L. R. 8 Q. B. 302).

A pedlar does not require a licence, but he must hold a five shillings certificate, which remains in force for one year only from the date of issue (ss. 4, 5), and is not assignable (ss. 10, 11). Forms of application for a certificate are supplied gratis at every police office (s. 9), and the certificate is granted by the chief officer of police of the district in which the applicant has resided during one month previous to his application, on such officer being satisfied that he is above seventeen years of age, of good character, and in good faith intends to trade as a pedlar. On the delivery up of the old certificate,

or on the chief officer of police being satisfied that it has been lost, the chief officer may at any time grant a new certificate in the same manner as upon a first application (s. 5, subss. 1, 6). If the chief officer refuse to grant a certificate, appeal may be made to a Court of summary jurisdiction (s. 15). A duly certified pedlar may trade as such within any part of the United Kingdom (44 & 45 Vict. c. 45, s. 2), and is a "licensed hawker" within the Markets and Fairs Clauses Act, 1847 (10 & 11 Vict. c. 14, s. 13), and any Act incorporating the same (34 & 35 Vict. c. 96, s. 6), provided he acts as a pedlar, and does not trade with a horse or cart (*Woolwich Local Board of Health* v. *Gardiner*, [1895] 2 Q. B. 497, dissenting from *Howard* v. *Lupton*, 1875, L. R. 10 Q. B. 598).

A certificate is not required (34 & 35 Vict. c. 96, s. 23) by—

(1) Commercial travellers or other persons selling or seeking orders for goods, etc., to or from persons who are dealers therein, and who buy to sell again, or selling or seeking orders for books as agents authorised in writing by the publishers;

(2) Sellers of vegetables, fish, fruit, or victuals;

(3) Persons selling or exposing to sale goods, etc., in any public market or fair legally established. As to the two last exemptions, see the cases cited relating to hawkers.

Penalties varying in maximum amount from five shillings to £2 are incurred by any person who—

(1) Makes a false representation with a view to obtaining a certificate, or forges a certificate, or travels with or produces a forged certificate. In these cases a subsequent offence is punishable with imprisonment in addition to the fine imposed on a first offence (s. 12);

(2) Acts as a pedlar without having a certificate (s. 4);

(3) Lends or assigns his certificate (s. 10); or makes use of one granted to another person (s. 11);

(4) Refuses on demand to produce his certificate to, and allow a copy of the same to be taken by, any justice of the peace, or any police officer, or any person to whom he offers his goods for sale, or on whose private grounds or premises he may be found (s. 17); or refuses to allow any police officer to open and inspect his pedlar's pack (s. 19). In these cases an offender is further liable to be arrested by any of the persons authorised to demand the production of his certificate, and by anyone acting in such person's aid at the latter's request, and to be conveyed before a justice of the peace (s. 18).

A pedlar is liable to the following additional penalties on conviction—

(1) Of any offence under the Act, the conviction is to be indorsed on his certificate (s. 14);

(2) Of begging, his certificate is forfeited (s. 16);

(3) Of any other offence, his certificate may be forfeited at the discretion of the Court before which he is convicted (s. 16).

As to penalties for peddling tobacco, etc., see the statutes cited above as to hawkers.

As to restrictions on employment of children, see 39 & 40 Vict. c. 79; 43 & 44 Vict. c. 23; 56 & 57 Vict. c. 51 (EDUCATION); and 57 & 58 Vict. c. 41 (CRUELTY *to Children*).

Hawking.—The sport of falconry being now practically extinct, does not call for treatment in this work. The right of hawking is still occasionally reserved in sporting agreements. See BIRDS.

Hay.—1. Setting or attempting to set fire to crops or stacks of hay is an indictable offence within secs. 16, 17, 18 of the Malicious Damage Act, 1861 (see Archb. *Crim. Pl.*, 21st ed., 599–601). Theft of hay is punishable as larceny.

2. The sale of hay and straw in London and Westminster, and within thirty miles thereof, is regulated by three statutes, 36 Geo. III. c. 88; 4 & 5 Will. IV. c. 21; and 19 & 20 Vict. c. 114, directed against false packing, light weight, and mixing old and new hay, and other frauds, in dealings in these commodities.

Haybote.—See ESTOVERS.

Headborough—Tithing Man—Borsholder.—The origin of petty constables is by some (1 Black. *Com.* 355) traced to the statute of Winton (13 Edw. I. st. 2, c. 6) and explained on the ground that the high constables under that Act required local deputies or subordinates. The Act created a duty as to watch and ward for towns, which corresponded to the duty of constables as to fortresses, and is recognised as devolving in boroughs on wardens of the wards (*custodes a quocunque vico burgi*), and elsewhere on the *franci plegii* or *decennarii* (4 Seld. Soc. Publ. 80), *i.e.* on the tithing men. There existed before 1285 for the purposes of view of frankpledge (or frith borgh) persons who are described as head boroughs or borow heads, borsholders (= borgh's alders), tithing men or chief pledges (*capitales plegii*), who were elected in the Court leet, and were responsible for the register and peace and order of their frankpledge, tithing, or township. And it is difficult to trace any reference to parish constables prior to 1328 (2 Edw. III. c. 3), where they are classified with "borgh alders." In the thirteenth century treatise on Courts Baron (4 Seld. Soc. Publ.) these common law officers are often mentioned, but a constable is not; and in the select pleas from manorial Courts (2 Seld. Soc. Publ.) and selection from the Coroners' Rolls (9 Seld. Soc. Publ.) abundance of evidence is given of the mediæval status of tithing men with reference to manorial jurisdictions and the emergence of the constable. On the creation of the commission of the peace the functions of these common law officers, and the Courts which they attended, seem slowly to have given way to the constable and the Courts of the justices, and frankpledge disappeared before articles of the peace. And while in the United States the office of tithing man continues in use as a parochial office, in England these offices have gradually disappeared or merged in the office of constable of parish or hundred, with the decay of frankpledge, tithings, hundreds, etc., Courts leet, and the supersession of the common law township by the ecclesiastical parish. But what are known as the common law powers of a constable seem to have been historically derived from the powers of these ancient officers. The latest enactments which speak of them as extant are the Indictable Offences Act, 1848 (c. 42, s. 10), and the Summary Jurisdiction Act, 1848 (c. 43, s. 3). See CONSTABLE: POLICE.

[*Authorities.*—Burn, *Justice*, 17th ed., tit. "Constable"; Hawk., P.C., bk. ii. c. 10; Dalton, *Country Justice*, c. 28; Pollock and Maitland, *Hist. Eng. Law*, i. 542–558.]

Hearing (*before Justices*).

1. At Quarter Sessions any two justices in the commission are a quorum

to hear and determine any indictment or appeal (see COMMISSION OF THE PEACE; QUARTER SESSIONS).

2. The judicial hearing of cases before justices out of Quarter Sessions is of two kinds—

(*a*) *Preliminary inquiry* as to an indictable offence which is regulated in the main by the Indictable Offences Act, 1848 (11 & 12 Vict. c. 42). This may be held by a single justice at a place which is not an open Court (1848, c. 42: but see 1879, c. 49, s. 20 (1), and Glen's *Summary Jurisdiction Acts*, 6th ed., p. 147). The person accused must be present at every stage of the hearing; but it is not necessary that it should be confined to the matter specified in any information, summons, or warrant, nor even that he should have been brought before the justice by any regular legal process (*R.* v. *Hughes*, 1879, 4 Q. B. D. 614). The accused may be defended by solicitor or counsel (1848, s. 17). The procedure is to read the information, if any, or state the charges, to take the evidence, examination, and cross-examination of the witnesses for the prosecution, which is taken down by the justice's clerk, and when complete read over to and signed by the witnesses. When this is complete, the justice, if there is a case to be answered, gives the accused the statutory CAUTION, and if he is a competent but not compellable witness on his own behalf, adds, "You are entitled but not bound to give evidence on oath on your own behalf." Then the statement, if any, of the defendant is to be made and taken down, and the evidence of himself or any witnesses for the defence in the same way as that for the prosecution, and when the depositions are completed the justice commits the accused for trial if he thinks the case one proper for a jury, or discharges him if the case appears unsubstantial.

The justice may adjourn the inquiry and remand the accused from time to time. But the remands must not exceed eight days (see *R.* v. *Evans*, 1890, 62 L. T. 570). On a committal for trial the prosecutor and the witnesses for the prosecution and for the defence (other than witnesses to character only), and the defendant if admitted to bail, are bound over to attend the Court at which the indictment is to be tried (see BAIL).

Where by reason of the character of the offence or the youth of the accused an indictable offence may be triable summarily, the proceedings are conducted under the Summary Jurisdiction Acts (see 1879, c. 42, ss. 11–15). Conversely, where by reason of a special statute, or the amount of punishment which can be inflicted, a person prosecuted under the latter Acts can elect to be tried on indictment, the Court must inform him of his right, and if he so elect, the procedure before justices is that of the Indictable Offences Act. Whether information as to the election is a condition precedent to the jurisdiction of the justices is at present in controversy.

(*b*) *Summary Trial.* — Under the Summary Jurisdiction Acts, excepting in cases where arrest without warrant is legal, accused must be brought before the Court by a warrant or summons founded on an information, which should not contain more than one matter of complaint (1848, c. 43, s. 10; Glen's *Summary Jurisdiction Acts*, 6th ed., 45–49). The trial must be in open Court, before a petty sessional Court consisting of two justices or one stipendiary magistrate, or in the city of London of one alderman (1848, c. 43, s. 12; 1879, c. 49, s. 20; 1889, c. 63, s. 13 (11)). One justice can, however, hear in open Court where so empowered by the statute on which the information or complaint is founded. It is not essential for the defendant to be present, except where an indictable offence is being summarily tried, and he may, whether present or not, be represented by solicitor or counsel (1848, c. 43, s. 12; *Bessell* v. *Wilson*,

1852, 22 L. J. M. C. 94). The procedure is to state the charge to the defendant, and ask the defendant if he is guilty or not guilty (1848, c. 43, s. 14). If he says the latter, the evidence for the prosecution is taken, examination and cross-examination. Minutes of the evidence may be taken by the clerk, and in cases under the Summary Jurisdiction (Married Women) Act, 1895, ought to be taken (see DESERTION OF WIFE AND CHILDREN). If the evidence shows an offence other than that originally charged, the proper course seems to be to dismiss the first charge and insist on a fresh information; but usually an adjournment is granted if the defendant desires it, but the defendant must have clearly stated to him the charge on which the final determination is to be made. It is a common practice, but of doubtful legality, to hear two or more summary charges together, and decide on all after hearing the evidence on each (*Hamilton* v. *Walker*, [1892] 2 Q. B. 25).

3. *Licensing Matters.*—Since the decision of *Boulter* v. *Kent Justices*, [1897] App. Cas. 556, the proceedings of justices in licensing matters must be regarded not as hearing before a Court of summary jurisdiction, but as business of a quasi-administrative character. See INTOXICATING LIQUORS.

Hearsay.—As to the circumstances under which "hearsay" evidence is admissible in Courts of justice, see ADMISSIONS: CONFESSION; DECLARATIONS OF DECEASED PERSONS; and EVIDENCE, where the general law on the subject is discussed.

Hedgebote.—See ESTOVERS.

Heimatlosen (German)—Those without a home, used on the Continent to describe persons without a nationality, *peregrini sine civitate*. Several Continental States, and chiefly Switzerland, from whose institutions the term has been borrowed, have endeavoured in their more recent enactments to provide against persons having no nationality. Thus in France (under the new Law of Nationality, Civil Code, Art. 19), in Portugal (Civil Code, Art. 23, s. 4), and in Italy (Civil Code, Art. 14), a woman marrying a foreigner only loses her nationality of origin provided she acquires that of her husband. In Belgium (Law of 8th June 1870 on the Militia) and in Roumania (Law of 5th March 1876) persons without any or of an uncertain nationality are liable to do military service, though they thereby do not acquire Belgian or Roumanian nationality (see Weiss, *Droit Inter. Privé*, Paris, 1894, vol. i. p. 22).

In the French Civil Code, again (Art. 8), all persons born in France of unknown parents, *or of parents whose nationality is unknown*, are declared to be French citizens.

Heir; Heirs.—Heir "in the legal understanding of the common law implies that he is *ex justis nuptiis procreatus* for *hæres legitimus est quem nuptiæ demonstrant*, and is he to whom lands, tenements, or hereditaments by the act of God and right of blood do descend of some estate of inheritance" (*Co. Litt.* s. 7 *b*). Hence the maxims—(1) That a bastard is "nullius filius" and therefore cannot be an "heir"; (2) "Solus Deus hæredem facere potest non homo"; and (3) "Nemo est heres viventis." The second maxim differentiates the "heir" of English law from the "heir" of the civil law, for the title of the latter might arise by devise; the

former, on the other hand, could derive it only by right of blood. The third maxim explains itself; so long as the ancestor is alive he who would on the death of such ancestor be his heir can at most be an heir-apparent or heir-presumptive. This leads us at once to the classification of heirs.

1. *Heir-Apparent.*—He who, provided he survives the ancestor, must succeed to the inheritance, his right to which is therefore indefeasible, *e.g.* the eldest or only son.

2. *Heir-Presumptive.*—He who, upon the death, if it were immediate, of the ancestor must succeed to the inheritance. His right is defeasible by the birth of another person more nearly related to the ancestor, *e.g.* a brother whose presumptive right may be defeated by the birth of a son, or a daughter whose presumptive right may be defeated by the like event.

3. *Heir-at-Law.*—Heir: he who by the common law of England (as distinguished from special customs) after the death of the ancestor has the right to the inheritance.

4. *Customary Heir.*—The heir to copyhold estates. The customary heir is generally identical with the heir-at-law unless there be proved a particular custom to the contrary. Of such particular customs may be instanced—

i. BOROUGH-ENGLISH: whereby the *youngest* son inherits his father's lands (sometimes called *ultimogeniture*).

ii. GAVELKIND: whereby all the sons inherit as coparcenors (see PARCENERS) their father's lands.

5. *Heir Special.*—He who is not heir-at-law (*i.e.* common law) but by special custom as above or heir to an estate tail.

The title of the heir derived, as has been said, by right of blood is called title by descent. Title by descent is subject to and governed by certain rules.

The rules of descent applicable to persons dying before January 1, 1834, and a table of such descent will be found in Stephen's *Commentaries*, 11th ed., vol. i. p. 378 *n* (*i*). The rules of descent applicable to persons dying after January 1, 1834, are contained in the Inheritance Act, 3 & 4 Will. IV. c. 106; and further rules in Lord St. Leonards' Act, 22 & 23 Vict. c. 35, ss. 19, 20. The descent of trust and mortgage estates is now governed by sec. 30 of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41). See INHERITANCE.

Heirs as a Word of Limitation: Heirs of the Body.—The word "heirs" used to be necessary in a limitation in order to create an estate in fee-simple. "If a man would purchase lands or tenements in fee-simple it behoveth him to have these words in his purchase, 'To have and to hold to him and to his heirs'; for these words make the estate of inheritance" (*Co. Litt.* s. 1). Words like "to him and his assigns for ever" gave him but an estate for life. Similarly, in order to create an entail, the word "body" or some other "words of procreation" (2 Black. *Com.* 114) defining more closely the class of heirs were necessary. The insertion of these technical words of procreation to create an estate tail was not, however, necessary in wills; and in three main classes of cases the word "heirs" has been interpreted by the Courts so as to have the more restricted meaning of "heirs of the body." These are—

(1) Where the word "heirs" is followed by the words "lawfully begotten." A devise to J. H. and his heirs lawfully begotten for ever has been held to give J. H. an estate tail only (*Nanfan* v. *Leyh*, 1816, 7 Taun. 85; 17 R. R. 453: *Good* v. *Good*, 1857, 7 El. & Bl. 295). Note, however, that the important word is "begotten," being practically a word of procrea-

tion; a devise to A. and his lawful heirs gives A. the fee-simple (*Matthews* v. *Gardiner*, 1853, 17 Beav. 254).

(2) Where the original limitation is followed by a gift over on failure of issue at any time. A devise to "A. and his heirs and assigns for ever" followed by a gift over after his decease without issue, has been held to give A. an estate tail only (*Greenwood* v. *Verdon*, 1853, 1 Kay & J. 74; *Biss* v. *Smith*, 1857, 2 H. & N. 105).

(3) Where a devise to A. and his heirs is followed by a gift over on A.'s death without issue to B., and B. is capable of being A.'s heir. In this case A. has been held to have but an estate tail, for otherwise the gift to B. could never possibly take effect (*Nottingham* v. *Jennings*, 1700, 1 P. Wms. 24).

The cases on this subject are collected, and rules deduced therefrom, in Hawkins on *The Construction of Wills*, pp. 175–177; see also Theobald on *Wills*, cap. xxix. (iii.), pp. 341 *sqq.*, 4th ed. But now the law as to the necessity of words of limitation in wills is governed by the Wills Act, 1837, which enacts as to wills made after the passing of the Act, that where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee-simple or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless the contrary intention shall appear by the will (7 Will. IV. and 1 Vict. c. 26, s. 28).

Some of the rules of interpretation for wills above mentioned have been applied or adapted to the interpretation of deeds; and in certain limitations the words "of his body" have been supplied by implication after the word "heirs." The cases are collected in Elphinstone on *Interpretation of Deeds*, 1st ed., pp. 231 *et sqq.* Now, however, the Conveyancing Act, 1881, provides as to deeds executed after the Act that it shall be sufficient in the limitation of an estate in fee-simple to use the words "in fee-simple" without the word "heirs," and in the limitation of an estate tail to use the words "in tail" without the words "heirs of the body" (44 & 45 Vict. c. 41, s. 51). That the use of the word "heirs" as a word of limitation and not as a word of purchase, *i.e.* to give an estate of inheritance to the ancestor, and not to give any separate estate to the heir, is its primary use in the eye of the law, is best evidenced by the old rule of law known as the rule in *Shelley's* case, viz.: "Where the ancestor takes an estate of freehold, and in the same gift or conveyance an estate is limited either mediately or immediately to his heirs or the heirs of his body, the word heirs is a word of limitation and not of purchase; so that the ancestor takes the whole estate comprised in the term, that is to say in the first case an estate in fee-simple, in the second an estate in fee-tail" (1 *Co. Rep.* 93; Tudor's *Leading Cases in R. P. and Conv.* 589).

The rule, it may be mentioned, is of much greater antiquity than the case from which it derives its name, and is so called merely from the fact that it was quoted in the argument to *Shelley's* case. The requisites for the application of it are—(1) A limitation of a prior estate of freehold to the ancestor; (2) an ultimate estate in remainder to the heirs; (3) both the estates to arise under the same instrument; (4) the estates limited must be both legal or both equitable (*Venables* v. *Morris*, 1797, 7 T. R. 342; 4 R. R. 455; *In re Wynch*, 1854, 5 De G., M. & G. 188; and see *In re White & Hindle's Contract*, 1877, 7 Ch. D. 201).

It must be remembered as to requisite (1) that it is satisfied by an estate *pur autre vie*, or indeed any estate for life subject or not to a conditional limitation (see ESTATES). And as to requisite (2) that the addition to the

word "heirs" of further words of limitation to their heirs makes no difference if these words are of the same import and extent as those first introduced (*e.g.* heirs and their heirs; heirs male . . . heirs male). The rule applies to copyholds as well as freeholds; nor is there any difference to be made between deeds and wills in the principles that govern its application (see *In re White & Hindle's Contract*, *ubi supra*); nor is such application excluded by a power of appointment given to the life tenant (*Richardson* v. *Harrison*, 1885, 16 Q. B. D. 85). It does not, however, apply to executory trusts. For a full discussion of the rule in *Shelley's* case, see Challis, *Real Property*, 2nd ed., cap. xiii.

In certain cases, however, such an intention may be gathered from the context as to justify the construction of "heir" as a word of purchase and not a word of limitation; the most notable example is the rule in *Archer's* case, 1 *Co. Rep.* 66, to the effect that words of limitation added to the word "heir" make the latter word a word of purchase, viz. by a limitation to A. for life followed by a remainder to his heir or heiress, and his or her heirs and assigns for ever, A. takes a life estate only with a limitation by purchase to the person who at A.'s death would answer the description of his heir or heiress at law in fee-simple (*Greaves* v. *Simpson*, 1864, 12 W. R. 773; 33 L. J. Ch. 641; and see the cases therein cited). It has been held also that the rule in *Shelley's* case has no application in the case of a limitation to the use of A. and his assigns during his life, followed by an ultimate limitation to the use "of such person or persons as at the decease of the said A. shall be his heir or heirs-at-law, and of the heirs and assigns of such person or persons"—A. by such a limitation taking not an estate in fee but for life only, with a contingent remainder in fee to the person or persons who at his death answered the description of his heir or co-heirs-at-law (*Evans* v. *Evans*, [1892] 2 Ch. 173, in which case the rule in *Shelley's* case, and the rule in *Archer's* case, and the decisions thereon were discussed by the Court of Appeal). See also the latest case, *Van Grutten* v. *Foxwell*, 1897, 66 L. J. Q. B. 745).

Other instances of "heir" and "heirs" being construed as words of purchase are—

(1) A limitation to A. with remainder to his "heir" in the singular, which, though it may under certain circumstances be brought within the rule in *Shelley's* case, is generally construed as giving a life estate only to A. and contingent remainder to his heir (*Chambers* v. *Taylor*, 1836, 2 Myl. & Cr. 376).

(2) Where it may be reasonably inferred from the context that the intention was to use "heirs of the body" as equivalent to "children," *e.g.* in construing a limitation to husband and wife for life, remainder to heirs of the body of the husband, and, *if more children than one*, equally amongst them as tenants in common, it was held that the husband did not take an estate tail but for life only, and that the children took by purchase as tenants in common in fee in remainder (*North* v. *Martin*, 1833, 6 Sim. 266).

(3) In marriage articles. See HEIRS OF THE BODY.

The designation of a specified person by a testator as his heir amounts to a residuary devise, and passes the realty undisposed of by the will, and the words "I acknowledge X. to be my next-of-kin and heir-at-law to all my real and personal property situate at Y." have been held to be an effectual gift to X., who was in fact neither heir-at-law nor next-of-kin of the testator (*Parker* v. *Nickson*, 1863, 1 De G., J. & S. 177).

(4) In limitations of gavelkind or borough-English lands to a man's

heirs, "heirs" is taken to mean the common law heir. The latter then takes as a purchaser, to the exclusion of the customary heir who would be the one to take were "heir" construed as a word of limitation (*Garland* v. *Beverley*, 1878, 9 Ch. D. 213).

The words "heir" and "heirs" are often wrongly used in connection with personal property, and difficult questions of construction arise as to whether the next-of-kin is meant or the heir-at-law as a "persona designata." Their use in these cases also may be either as a word of purchase or as a word of limitation. In gifts of personalty it is more frequently the former, and we will consider that first.

"*Heirs*" *in Gift of Personalty used as a* "*Word of Purchase*."—The presumption is that the heir-at-law is entitled under the gift, and the presumption is made even stronger when such gift is of a *blended* fund of personalty and realty. The rule raised by the presumption applies whether the gift be directly to the heirs of any named person, or whether it be in remainder to such heirs after a prior life estate (*De Beauvoir* v. *De Beauvoir*, 1854, 3 H. L. 524; *Smith* v. *Butcher*, 1878, 10 Ch. D. 113).

The word will therefore receive this its ordinary and primary meaning unless such an intention can be gathered from the context as to lead the Court to infer that the testator meant to use the word in a secondary and less proper sense as equivalent to next-of-kin. And it must be noted that, in interpreting heir as next-of-kin, the next-of-kin for this purpose are the persons entitled under the Statutes of Distribution (including therefore a widow), and that the Statutes of Distribution not only designate who are the persons to take, but also the shares in which they shall take (*In re Steevens*, 1872, L. R. 15 Eq. 110; *Jacobs* v. *Jacobs*, 1853, 16 Beav. 557).

The most frequent instances of such cases are substitutional gifts, *e.g.* in a gift to A. or his heirs, "heirs" is construed to mean the statutory next-of-kin (*Jacobs* v. *Jacobs*, *ubi supra*; *Parsons* v. *Parsons*, 1869, L. R. 8 Eq. 260; *In re Stannard*, 1883, 52 L. J. Ch. 355). So in a devise of freeholds on trust after the death of the survivor of several life tenants to sell and divide the money equally amongst "their several heirs," the context is sufficient to show that children and not heirs-at-law were intended (*Bull* v. *Comberbach*, 1858, 25 Beav. 540). Other cases illustrative of such an intention gathered from the context will be found in Theobald on *Wills*, 4th ed., pp. 279–281.

But where real and personal estate are given together, and there is no blending of them into one fund on the face of the instrument, the word "heirs" is taken to have a twofold meaning, viz. heir-at-law as regards the real estate, and the statutory next-of-kin as regards the personalty (see *Keay* v. *Boulton*, 1883, 25 Ch. D. 212; following *Wingfield* v. *Wingfield*, 1878, 9 Ch. D. 658, and distinguishing *Smith* v. *Butcher*, *supra*).

"*Heirs*" *in Gifts of Personalty used as a* "*Word of Limitation*."—A bequest of personalty to A. and his heirs gives A. an absolute interest therein. So likewise there can be no estate tail in personalty; and a bequest thereof to A. and the heirs of his body gives A. an absolute interest (*Leventhorpe* v. *Ashbie*, Rolle's Ab., 831, pl. 1; Tudor's *L. C. R. P.* 861; *In re Barker*, 1883, 52 L. J. Ch. 565). It is immaterial for the purposes of this general rule that the income only is given to A. for life. The rule has been stated shortly, that whatever disposition would suffice in the case of realty to give an estate tail in personalty passes to the first taker the absolute interest. So that if it can be shown that "heirs" is used as a word of purchase and not of limitation, the first taker's life estate will not be enlarged (*In re Russell*, 1885, 52 L. T. 559).

Heirlooms.—Heirlooms, strictly so called, are such personal chattels as pass on their owner's death, by force of a special custom, to his heir, along with his inheritance, and not to his executor or administrator. Coke says (*Co. Litt.* 18 *b*) that in some places chattels as heirlooms (as the best bed, table, pot, pan, cart, and other dead chattels moveable) may go to the heir; and explains that the heirloom is due by custom and not by the common law. He also points out (*Co. Litt.* 185 *b*) that a devise of chattels, which are heirlooms, is void. In *Polgrenn* v. *Feara* (Hen. VI.), 1 Cal. xxxix., a bill in Chancery was brought by the heir against the executor of a dead Cornishman, alleging a custom in Cornwall for the heir to have the principal goods of the deceased (see also Bro. *Abr.* "Discent," 43). The ancient jewels of the Crown are heirlooms (Fitz. *Abr.* "Exors." 108; *Co. Litt.* 18 *b*). The owner of heirlooms may dispose of them in his lifetime, though not by will (Cro. (3) 344; 2 Black. *Com.* 429).

There are also certain chattels personal which are said to be in the nature of heirlooms, and as such to pass to the heir at common law. Of this nature are things erected in a church in honour of a dead person, as the coat armour or other ensigns of honour of a nobleman, knight, or esquire (*Corven's* case, 12 Rep. 105; *Co. Litt.* 18 *b*). The garter and collar of S. S. of a deceased knight have been held to be things of the same kind (*Earl of Northumberland's* case, 26 Eliz., Owen 124). And the same was said in the well-known suit for delivery up of the Pusey horn (*Pusey* v. *Pusey*, 1684, 1 Vern. 273), of an ancient horn where the land is held by cornage. Deed boxes containing the title-deeds of land appear to be another instance (Wentworth, *Office of Exor.* 156, 157, 14th ed.).

In popular language the term "heirloom" is generally applied to plate, pictures, furniture, or other articles, which have been assigned by deed of settlement or bequeathed by will to trustees, in trust to permit the same to be used and enjoyed by the persons for the time being in possession, under the settlement or will, of the mansion-house in which the articles may be placed.

[*Authorities.*—See also 1 Wms. *Exors.* Pt. II. bk. ii. ch. ii. s. 3, pp. 633–635, 9th ed.: Wms. *Pers. Prop.* 13, 14. 11th ed.: 125, 126, 14th ed.]

Heirs and Assigns.—The addition of the word *assigns* to the word "heirs," though now of no value for practical purposes, originated with, and is the evidence of, an attempt (made before the Statute *Quia Emptores* and in the times of subinfeudation) to give the tenant in fee ampler powers of alienation, by depriving the lord of his right of escheat. It was then the accepted opinion that if a tenant in fee—holding to himself and his heirs—alienated, such alienation could be validly made only for such time as heirs of the tenant existed. Upon failure of such heirs the new grantee's estate escheated to the lord. The grantee by subinfeudation, in fact, held during the life of the heirs of the original tenant only. To counteract this arose a new kind of grant, viz. lands were granted not only to A. and his heirs, but to A. his heirs *and assigns*. "If the tenant under such a gift assigned his land to another in fee, the latter and his heirs had the right to hold the land on failure of the former's heirs as tenants of the former's lord, who was by his original gift bound to warrant quiet possession to the assigns as well as the heirs of his donee" (Williams, *Real Property*, 17th ed., p. 68). By the Statute *Quia Emptores* (18 Edw. I. c. 1) every tenant in fee was enabled to substitute another in his place to hold to himself and his heirs whether the original grant had or had not been

to the first tenant his heirs *and assigns* (see Pollock and Maitland's *Hist. Eng. Law*, vol. ii. pp. 14 and 16; Williams, *Real Property*, 17th ed., pp. 66–71).

Where the word "heirs" if used alone would have made a gift substitutional, the addition of the word "assigns" will rebut the presumption, so that in a gift to *A. or his heirs or assigns*, the words "heirs or assigns" will be treated as words of limitation, and A. will take absolutely (*In re Walton*, 1856, 8 De G., M. & G. 173; see also the case of *Brookman* v. *Smith*, 1871, L. R. 6 Ex. 291; 1872, L. R. 7 Ex. 271). See HEIRS.

Heirs of the Body.—These words were before the Conveyancing Act, 1881, necessary to create an estate tail; sec. 51 of that Act (44 & 45 Vict. c. 41) provides as to deeds executed after the Act that it shall be sufficient in the limitation of an estate tail to use the words "in tail" without the words "heirs of the body."

Heirs of the body may in the limitation be restricted—(1) as to sex, to heirs male or heirs female; or (2) as to the person from whom they are to spring (*e.g.* heirs of the body of A. by B., his present wife).

The only kind of estate tail to create which the words "heirs of the body" were not necessary was an *estate in frankmarriage*, the word "frankmarriage" not only *ex vi termini* creating the inheritance if used in the gift, but also limiting it so as to make the donees tenants in tail special. See FRANKMARRIAGE.

Heirs of the body is in marriage articles often construed as "the first and other sons" and the settlement is made on them successively in tail—otherwise the manifest intention of the parties, viz. to make provision for the issue of the marriage, might be defeated by the parents (*Stonor* v. *Curwen*, 1832, 5 Sim. 264), and the rule was applied by analogy to the case of chattels, these being made to vest in the eldest son.

In a devise upon a discretionary trust for the benefit of the heirs of the body of E. L. for the trustees to educate at their discretion the said heirs and to pay the residue to them as E. L. might appoint, "heirs of the body" was construed to mean such of the statutory next-of-kin of E. L. as were descended from her (*In re Jeaffreson*, 1866, L. R. 2 Eq. 276).

A peculiar form of entail should be noticed here, viz.: A devise to the heirs of the body of A. confers an estate tail though there be no previous estate of freehold limited to the ancestor. This is the well-known "rule in *Mandeville's* case" (see *Co. Litt.* s. 26 *b*). "It might not be very difficult to show that the exigency of the Statute *de Donis*, which peremptorily directed that the will of the donor should always be observed, left no alternative but to decide *Mandeville's* case as it was decided, inasmuch as when the estate was limited to the heirs of a particular ancestor without any estate of freehold limited to the ancestor himself (either expressly or by implication) it was impossible to effectuate that expressed will of the donor . . . except by regarding the limitation as if it were an estate tail which had originally vested in and descended from the ancestor himself; and yet the first taker must take as purchaser because no estate did in fact vest in or descend from the ancestor" (per Kindersley, V.C., in *Wright* v. *Vernon*, 1854, 2 Drew. at p. 455, cited in *Moore* v. *Simkin*, 1885, 31 Ch. D. 99). To these reasons is due the creation of this anomalous kind of entail, called often a quasi-entail. And in *Moore* v. *Simkin*, *supra*, it was held that there was no reason why the rule should be applied to an ordinary case where the limitation is to heirs general and not to heirs

special. See also on this rule, Note (*e*) Jarman on *Wills*, 5th ed., p. 906. See ESTATES OF INHERITANCE; HEIRS.

Heligoland.—An island in the North Sea, taken by the British Government from the Danes in 1807, and formally ceded in 1814. During the British occupation the island was under a Lieutenant-Governor; the people retained their own laws and customs. There was an appeal from the magistrates to the Lieutenant-Governor, and from him to H.M. in Council (see *Siemens* v. *Heirs of Bufe*, 1856, 11 Moo. P. C. 62). The sovereignty of Heligoland was ceded by Great Britain to the German Emperor by an agreement dated 1st July 1890, confirmed by Act of Parliament (53 & 54 Vict. c. 32).

Henceforth.—See FROM; and Stroud, *Jud. Dict.*, *s.v.* "From henceforth."

He or they paying Freight.—These words are generally found in bills of lading or charter-parties where goods are shipped by one person and consigned to another or his assigns, who are to pay freight for them. The consignees in such a case are liable to pay the freight due if they receive the goods, unless on the face of the contract they are only agents, for their receipt of the goods implies a contract on their part to pay the freight (*Cock* v. *Taylor*, 1811, 13 East, 399; 12 R. R. 378; *Amos* v. *Temperley*, 1841, 8 Mee. & W. 798). But the clause is intended for the benefit, not of the shipper, but of the master or shipowner, to enable him, if he thinks fit, to insist on payment before delivering the goods; but it does not oblige the master to obtain the freight before delivery, and consequently the shipowner, if the consignee will not pay the freight after receiving the goods, can resort to the shipper for the freight due under the bill of lading, whether there is a charter-party or not (Lord Ellenborough, *Shepard* v. *De Bernales*, 1811, 13 East, 565; 12 R. R. 442; *Domett* v. *Beckford*, 1833, 5 Barn. & Adol. 521, overruling *Drew* v. *Bird*, 1828, Moo. & M. 156). See BILLS OF LADING.

Heralds; Heraldry; Heralds' College.—The office and functions of heralds, the science or art of heraldry, and the College of Arms, which was incorporated in 1483 by Richard III., still survive, and possess a certain legal importance: though the greater part of the learning connected with them has had chiefly an antiquarian or quasi-legal interest since the end of the seventeenth century. The Court of the Earl Marshal of England (*q.v.*) became obsolete, partly owing to the decay of the mediæval military system, and partly to the prohibitions which the common law Courts issued against proceedings brought in it for infringements of the privileges of the heralds. The last declaration of war by heralds in Europe was in 1657 on a war between Sweden and Denmark; and it was exactly a hundred years before that England made use of them for that purpose for the last time. After the cases of *Oldis* v. *Donmille* (Show. P. C. 58) and *Russel's* case, (1692, 4 Mod. Rep.; 4 W. & M. 42) the conusance, correction, and disposition of coats of arms, and ordering of funeral pomps, which time out of mind had belonged to the heralds, were taken in hand by

undertakers, seal-engravers, carriage painters, gold and silver smiths, and others, who resisted the efforts of the authorised heralds to subject them to the discipline of the Earl Marshal's Court; and those officers discovered that the only remedy left to them, whatever it was worth, was an action on the case for wrong done to them in their office, a mode of redress which, however, they seem never to have sought.

It appears, from the cases above quoted, that the common law Courts would not have considered themselves entitled to restrain proceedings in the Earl Marshal's Courts taken for the purpose of redressing wrongs, done to the rightful possessors of arms, against the rules of honour. Yet, from that time, there was always sufficient doubt, after the constable of England ceased to be appointed, as to the jurisdiction of the marshal alone to make recourse to it a matter of great uncertainty. (See EARL MARSHAL.)

Thus the visitations of the heralds exercising commissions under the Great Seal to examine into the rights of all persons who assumed to bear arms, ceased after the year 1686, as the heralds could no longer maintain their authority, enforce their commands, or punish delinquents by means of that Court. The Courts of common law had and have never taken under their cognisance the subject-matter of armorial bearings; and the rights thereto, therefore, lost all their significance in law. The practical use of heraldry now consists in whatever value it may possess of furnishing proofs in questions of descents and pedigrees in cases of disputed titles to honours, dignities, and inheritances. (See ARMORIAL BEARINGS.)

The heralds, from the time of the establishment of the Court of the CONSTABLE AND MARSHAL, were the ministers of those great officers of State; and they were subject to the commands of the sovereign and his two officers in the discharge of their respective military and ceremonial functions, and in their jurisdiction over the matter of armorial bearings. As to the time when heralds were introduced into England, their functions as the messengers of the kings in peace and war, and orderers of court, and other ceremonies, when their creation passed into the hands of the Earl Marshal, and other such matters, many of which are extremely obscure, reference must be made to the books which treat at large of heraldry and the laws of arms. But at the incorporation of Heralds' College, or the College of Arms, the Earl Marshal was placed at the head of the new corporation, and the division of the officers into Kings of Arms, Heralds of Arms, and Pursuivants was fixed as at present; and the orders and statutes drawn up in 1568 by command of Queen Elizabeth, to be observed and kept by the officers of arms, recite that the Earl Marshals had the nomination or placing of all the king's heralds and pursuivants of arms into their several offices, and authority to make orders and statutes to be observed and kept both in general and amongst themselves in regard to each other. The officers then, as now, were the three kings of arms, Garter, Clarencieux, and Norroy; six heralds, viz. Somerset, Chester, Windsor, Richmond, Lancaster, and York; and four pursuivants, Rouge Dragon, Portcullis, Blue Mantle, and Rouge Croix. (See COMPANIONS (KNIGHTS COMPANIONS) OF THE GARTER.)

Garter was declared the principal king of arms, with pre-eminence over the others; Clarencieux, provincial king in all parts of England south of the Trent; Norroy, provincial king north of it. No new arms were to be granted without the consent of the Earl Marshal; but the three kings might jointly give new crests and share the profits, no other officer of arms having any rights in the matter, though in respect of other business in the college the fees were shared amongst them.

With the consent of the Earl Marshal, therefore, the two provincial kings grant arms and crests and other armorial ensigns within their respective provinces, as they are empowered to do in their patents. The sovereign, however, by virtue of his prerogative, may make such grants, either to subjects or foreigners, without the interposition of these officers.

Bath, who is a king of arms, is not a member of the college; the Order of the Bath at the time of the above statutes not having been constituted (see BATH, ORDER OF), and there having, previous to the incorporation of the heralds, been no herald of that name. But, by the constitution of the Order, the Bath herald was made a king of arms and principal herald of the parts of Wales.

The pursuivants are not officers of arms but the next degree under, being only in the state of the noviciate for the office of herald. They were the "followers" of the heralds, and acted as their scribes. For the origin of the pursuivants and their nomenclature, see Edmondson's *Heraldry*, vol. i. pp. 123, 124.

Heralds, or pursuivants, extraordinary are sometimes created; the two at present being Surrey Herald and Maltravers Herald. One of the purposes for which they are created seems to be to enable them to be promoted to vacancies of the kings of arms, or of the heralds, out of the ordinary course.

The privileges granted to the heralds by charter of Edward VI., and with the authority of Parliament, by which they were freed and discharged from all subsidies, tolls, taxes, and customs, and as well from watch and ward as from the election to any office of mayor, sheriff, bailiff, constable, scavenger, churchwarden, or any other public office, are no longer valuable. In the modern Acts of Parliament imposing taxation, such as the Income Tax Acts, the Land Tax Acts, and the Customs Acts, the privileges of such corporations and officers have been expressly taken away.

The records of Heralds' College, which are kept either there or in the Harleian Library, are of importance as sources of evidence in support or defence of peerage claims or other claims where pedigrees are in question. Twelve different classes of these documents may be mentioned:—

1. The visitation books, containing the arms and pedigrees of the nobility and gentry, which were delivered to the heralds by virtue of their commissions from the Crown authorising them to be made out, proved, and delivered. They range from the reign of Henry VIII. in 1528–29 to the reign of James II. in 1686. They are of authority as evidence in the nature of official records, and their admissibility has never been judicially questioned: but copies, though made by heralds, do not stand on the same footing.

2. Books containing miscellaneous pedigrees and arms, being entries made in the office as well during the time when visitations were in use as since that period, and down to the present day. These are not "official records," entitled to be of themselves admitted in evidence; and heralds' books have been often rejected on the ground of their being *ex parte* statements. In the De Lisle Peerage case the House of Lords said that on the cessation of the visitations, and where the books were mere entries of that which the parties had chosen to have entered in the registries, without any due authority being shown, they had not been received in evidence. Thus the House requires the production of the original commission under which a visitation was held before admitting the visitation book itself to be put in evidence; and the connection between the commission and the visitation must also be shown. In all the cases the question of admitting or rejecting the document turned upon whether there was the proved signature of some member

of the family appended; in which event the pedigrees were used as secondary evidence in the nature of declarations and reputation.

3. Books of pedigrees and arms of the peers made pursuant to standing orders of the House of Lords in 1767. They were registered after proof at the bar of the House; but the Order was rescinded in 1802, and the registry then ceased and has never been revived.

4. Books of pedigrees and arms of baronets, which are registered under a Royal warrant made in 1783. The patents of baronets were not registered before then; but the first registration was then made under that Order, and still continues; and the pedigrees of baronets are ordered to be recorded before the passing of the patent.

5. Books of entries of funeral certificates, being attested accounts of the time of death, place of burial, and of the marriages and issue of the several persons whose funerals were attended by officers of arms or their deputies. The original certificates are admitted in evidence in the same way as the original visitation. Such of the certificates as are not originals, as some of them appear to be, would probably not be received in evidence. The books in which they have been registered have also been produced and admitted in various cases. The certificates are good evidence as official statements of the fact of death; but if it is intended to prove matters of pedigree, as marriage or issue, the signature of some person of the family is necessary.

6. Books containing accounts of Royal marriages, coronations, and funerals.

7. Earl Marshals' books from the time of Queen Elizabeth to the present time. They contain entries of such instruments and warrants passed under the Royal sign-manual as relate to the arms of the blood royal, licences from the Crown for the change of surnames and arms, or for acceptance of foreign honours, etc., and, generally, whatever relates to that part of the office of Earl Marshal which concerns the superintendence of the college, or relates to matters of State concerning which the public orders are issued by the Earl Marshal, or within his department. The books are received in evidence as official records.

8. Books of arms of the nobility and Knights of the Garter and Bath, and dockets or copies of all grants of arms to the present time.

9. A list of knights from early times, and the only authentic record of the names, etc., of individuals upon whom the honour of knighthood has been conferred from the commencement of the reign of James I. up to 1834. (See KNIGHTS BACHELORS.)

10. A register of the pedigrees and arms of Knights of the Bath (*q.v.*) and their respective esquires since 1804.

11. Registers of arms and pedigrees relating to Scotch and Irish families, copies of which have been transmitted from the respective offices of Lyon King of Arms of Scotland, and Ulster King of Arms of Ireland.

12. A series of partition books from the reign of Henry VIII., containing an account of fees received on the creation of peers, baronets, and knights, and upon the consecration and translation of bishops; as also for the attendance of the officers of arms at Royal coronations, funerals, and other public ceremonies.

All these last five classes are receivable in evidence as official records.

For the numerous cases illustrating the various points on the subject of evidence above mentioned, see Hubback on *Succession*, pp. 538–566. In *Slade* v. *Tucker*, 1880, 14 Ch. D. 824, it was held that a pursuivant or herald of Heralds' College, employed in the conduct and support of a protest against a pedigree sought to be enrolled in the college, is not a legal adviser;

therefore communications between him and his employer are not privileged in a court of law. The defendant, as pursuivant, had lodged a protest against the registering of a pedigree on a succession to a baronetcy (which, as above mentioned, it is the duty of the college to register) on behalf of an adverse claimant, and by the custom of the college he had been ordered to advise and assist the protestor. In an action by plaintiff for the purpose of recovering the estates, the defendant had refused to answer certain questions as to matters of pedigree with which he had become acquainted while thus acting officially, and claimed the privilege of a legal adviser; but he was ordered to answer the questions.

[*Authorities.*—Edmondson's *Heraldry*, vol. i.; Hall, *International Law*, 4th ed., p. 393; Twiss, *The Law of Nations*, p. 60.]

Hereafter valued and declared.—These words are generally found in a "floating" policy of marine insurance, which leaves the interest which is to be insured to be declared when the risk is about to begin on it, *e.g.* in the case of goods, when they are about to be shipped. Floating policies are generally utilised to cover a shipment of goods for which the means and time for shipping are not known to the person wishing to insure them when he makes the policy. See MARINE INSURANCE.

Hereditaments.—"Hereditament is the largest word of all in that kind: for whatsoever may be inherited is an hereditament, be it corporeall or incorporeall, reall or personall, or mixt" (*Co. Litt.* s. 6 *a*). See CORPOREAL HEREDITAMENTS; INCORPOREAL HEREDITAMENTS.

The definition of the word in *Moor* v. *Denn*, 1806, 2 Bos. & Pul. 247, that "the settled sense of the word is to denote such things as may be the subject-matter of inheritance, but not the inheritance itself," implies how comprehensive is the term; this definition was recognised in *Tomkins* v. *Jones*, 1889, 22 Q. B. D. 599, where Bowen, L.J., said, "The word is not used as describing the quantum of interest of the subject-matter, but as describing the subject-matter itself, namely, the land." At times, however, the context may be such as to restrict the ordinary and wide meaning of the word. The word has frequently been the subject of judicial interpretation as regards the meaning to be given to it in certain statutes. The most recent case is *The Metropolitan Ry. Co.* v. *Fowler*, [1893] App. Cas. 415, where the right and interest of a railway company in a particular tunnel was held to be a hereditament and not merely an easement, and the company were held liable in respect thereof under sec. 4 of the Land Tax Act, 1797 (38 Geo. III. c. 5).

In *Tomkins* v. *Jones* (*ubi supra*) (also 58 L. J. Q. B. 222) it was held that the County Court had no jurisdiction to try an action in which the title to leasehold was in question: sec. 56 of the County Courts Act, 1888, providing that "the Court shall not have cognisance of any action in which the title to corporeal or incorporeal hereditaments shall be in question," the Court of Appeal holding that, in the section in question, hereditament included land, and land included leaseholds. See also *Chew* v. *Holroyd*, 1852, 8 Ex. Rep. 249, a decision under 9 & 10 Vict. c. 95, s. 58, of the old County Court Act of 1846. On the other hand, it has been decided that "paving rates" are not hereditaments within the latter Act, and that the County Courts had jurisdiction (*Baddeley* v. *Denton*, 1849, 4 Ex. Rep. 508; 19 L. J. Ex. 44;

Gwynne v. *Knight*, 1848, 1 Ex. Rep. 802; 17 L. J. Ex. 168; and see *Annual County Courts Practice*, 1898, p. 417).

For the judicial interpretation of the word in connection with secs. 3 and 68 of 8 & 9 Vict. c. 18 (Lands Clauses Act), and secs. 6 and 16 of 8 & 9 Vict. c. 20 (Railway Clauses Consolidation Act), see *R.* v. *Cambrian Rwy. Co.*, 1871, L. R. 6 Q. B. 422.

In the construction of a will, the words *estates and hereditaments* have been held to include moneys directed to be laid out in the purchase of lands and resettled (*Bassett* v. *St. Levan*, W. N., 1894, 204).

Hereditary Revenues of the Crown.—The rents of Crown lands (see CROWN, LAND REVENUES OF) formed from very early times the chief source of this branch of the royal revenue. To this, others were in course of time added; these were (1) feudal dues, for which, on their abolition at the Restoration, was substituted an excise duty on beer, ale, and other liquors; (2) the proceeds of the Post Office; (3) wine licences; and (4) moneys arising from fines on various writs. On the accession of George III., the king, in return for a fixed civil list (see LIST (CIVIL)), surrendered his life interest in the hereditary revenues, which were then paid into what was first called an aggregate fund, and afterwards, on its institution, into the Consolidated Fund. Again, on the accession of George IV. a similar surrender of the hereditary revenues took place. A still further transfer of the proceeds of the hereditary revenues of the Crown to the Consolidated Fund took place on the accession of William IV., and again when Her Majesty the Queen ascended the throne, for in those two instances the rents of the Crown lands, etc., in Scotland were likewise included. Each surrender, however, has been only of the sovereign's life interest, and has been accompanied by an express declaration that after the sovereign's demise the hereditary revenues should be payable and paid to his or her successors (see Civil List Act, 1837, s. 2); but it is unlikely that the present arrangement of paying the income from them into the Consolidated Fund and settling a fixed civil list on the sovereign will ever be disturbed. See LIST (CIVIL); CROWN; CROWN, LAND REVENUES OF.

[*Authority.*—May, *Constitutional History of England*, 3rd ed., ch. iv.]

Herein.—As to when the term "herein" in a will includes a codicil by reference, see 1 Jarm. *Wills*, 9th ed., 151. The question arises in connection with legacies and exemptions from legacy duty. See further, Stroud, *Jud. Dict.*, *s.v.* "Herein," "Hereinafter"; and article WILLS.

Heresy (αἵρεσις).—Heresy properly means the maintenance of a false opinion repugnant to some doctrine of the Church not involving an absolute denial of Christianity. The following definition is approved by Sir Matthew Hale, P. C., i. 383: "Sententia humano sensu excogitata, palam docta et pertinaciter defensa."

Heresy was throughout the Middle Ages punished by the Church Courts in England, but the penalties inflicted were only ecclesiastical censures, imposition of penances, excommunication, and in the case of clerics deprivation of ecclesiastical benefices (but as to this, see Maitland, article cited, *infra*). The civil law of the Roman Empire, however, provided death by burning at the hand of the State as the penalty for obstinate and

relapsed heretics, who had not sought mercy before sentence was passed; and the English canonists certainly regarded this provision as part of the common law of England (Lindwood, lib. v. tit. 5. p. 239 *n*). A writ *de comburendo hæretico* was in fact issued for the burning of a heretic between 1400 and 1677, but whether the offence of heresy was properly punishable by death at common law, and whether such a writ had in law any authority, is a point of great difficulty (Stephen, *Hist. Crim. Law*, pp. 438–469, and consider *Sawtre's* case in Stephen, *supra*, and Bracton, *de Coronâ*, lib. 113, c. 9, fol. 129 *a*). The writ was not a writ of course, but issued only by the special direction of the King in Council.

It was further doubtful whether a conviction before the ordinary was sufficient ground for the writ *de comburendo hæretico*, or whether a conviction before Convocation was not also required. The burnings of heretics, which frequently took place under the Lancastrian and Tudor sovereigns, were carried out for the most part in virtue not of common but of statute law (namely, the Acts 5 Rich. II. st. c. 5; 2 Hen. IV. c. 15; 2 Hen. V. c. 7; 25 Hen. VIII. c. 14; 31 Hen. VIII. c. 14; 34 & 35 Hen. VIII. c. 1; 1 & 2 Phil. & Mary, c. 6), but all statutes against heresy were repealed by 1 Edw. V. c. 12, s. 2, and 1 Eliz. c. 1, s. 6 (which latter Act repealed the statutes re-enacted by 1 & 2 Phil. & Mary, c. 6).

Prior to the last-mentioned Act (1 Eliz. c. 1) there had been no legal definition of heresy; the lay Courts accepting on this point the finding of the ecclesiastical tribunals, although a temporal judge might incidentally take knowledge whether a tenet was heretical or not. But the Statute 1 Eliz. c. 1 provided that nothing should be adjudged heresy by the commissioners appointed under it, except such matter or cause as had formerly been adjudged to be heresy by the authority of the canonical Scriptures or of the first four general councils, or by any other general council, wherein the same was declared heresy by the express words of canonical Scriptures, or such as should thereafter be adjudged to be heresy by Parliament, with the assent of the clergy in Convocation. Although this particular section has been repealed, the principle which it lays down appears to have been acted on by the Courts since the Reformation.

The Act 29 Car. II. c. 9 abolished the writ *de hæretico comburendo*; but by sec. 2 reserves the rights of archbishops, bishops, and ecclesiastical judges to punish heresy by excommunication, deprivation, degradation, and other ecclesiastical censures in such sort as before that Act. When it is only a question of punishment by ecclesiastical censure, a diocesan may proceed to sentence for heresy.

The ecclesiastical penalties for heresy therefore remain, but the law is obscure, and it is almost needless to say not put in practice. Sir James Stephen expresses an opinion that a layman guilty of heresy may still be prosecuted in an ecclesiastical Court, and if he refuse to recant, be excommunicated; the effect of which would be that the Court might direct him to be imprisoned for any term not exceeding six months (Stephen, *Hist. Crim. Law*, vol. ii. p. 681). See also articles APOSTASY; BLASPHEMY; DISCIPLINE, ECCLESIASTICAL; EXCOMMUNICATION.

[*Authorities.*—Lindwood, *Prov.*; Gibs. *Codex*; Ayliffe, *Par.*; Hawkins, *Pleas of the Crown*; Hale, *Pleas of the Crown*; Black. *Com.*; Phillimore, *Eccl. Law*, 2nd ed.; Stephen, *Hist. Crim. Law*. See also as to the earlier law on the subject, Professor Maitland, *Law Quarterly Review*, vol. ii. p. 153, article "The Deacon and the Jewess, or Apostasy at Canon Law"; and article CANON LAW in vol. ii. *ante*.]

Heriot.—The etymology of the word "heriot" is from the Anglo-Saxon word *heregeatu*, military apparel (Pollock and Maitland, *Hist. Eng. Law*, vol. i. p. 270; see also Scriven on *Copyholds*, 7th ed., p. 244; *Garland* v. *Jeckyll*, 1824, 2 Bing. 273; 27 R. R. 630).

In ancient times it is said that the arms of the tenant, originally supposed to have been given by his lord, were returned to him that they might continue to be used in the service of the State (see *Laws of Cnut*, vol. ii. pp. 70, 71; Pollock and Maitland, *supra*). It is probable that as before the Norman Conquest the lord had commenced to provide his tenants with land instead of armour, the payment of the heriot was regarded somewhat in the nature of a relief paid in respect of the land. As to the distinction in modern law between a heriot and a relief, see Watkins on *Copyholds*, p. 99, note. By the thirteenth century the payment of the heriot had been commuted for a payment in money or for the tenant's beast or other dead or live chattel. As to whether the heriot of the best beast was a commutation for the military heriot, and as to how far it was a voluntary payment, see Scriven, p. 244; Wilkins, p. 100; 2 Black. *Com.* p. 97; Pollock and Maitland, *supra*.

Heriots fall into three divisions—

Heriot service;
Suit heriot;
Heriot custom.

Heriot service, properly so called, is supposed to arise as the condition of an original reservation or grant on a fee-simple tenancy of freehold lands made before the Statute *Quia Emptores* (18 Edw. I.), and the right to take advantage of the conditions follows the seignory or lordship of the manor. It consists in the lord's right to seize the best beast or chattel or some beast or chattel of a tenant seised of an estate of inheritance. It is doubtful whether a right in a lord of the manor to take a heriot as due by heriot service can exist in the case of a copyhold tenant (see *Western* v. *Bailey*, [1897] 1 Q. B. 86; Watkins, p. 104; Scriven, p. 286). Heriot service is of the nature of a rent, and the lord may therefore distrain for it, but only on the tenant's lands within the manor (*Austin* v. *Bennett*, 1693, 5 Will. & Mary, 1 Salk. 355), but the distress may be levied on the beasts or chattels of a stranger found on the manor. When the right is to seize the best beast, as the property is in the lord on the tenant's death, he may seize the same, and is bound by his election. He may not, however, seize the beast of a stranger, and his title will be defeated by a sale by the executors of the tenant in market overt (*Odiham* v. *Smith*, 1593, 35 & 36 Eliz. Cro. (1) 589).

The purchase by the lord of any part of the tenant's land in respect to which heriot service is due will extinguish it; but if the tenant sell part of the land to a stranger and afterwards the residue to the lord, the land held by the stranger will still be subject to heriot service (*Chapman* v. *Pendleton*, 1609, 2 Brownl. 293).

To bind an assignee to pay a heriot it is necessary that he be particularly named (*Randell* v. *Scory*, 1633, 8 Car. I. Cro. (3) 313).

Suit heriot arises by way of reservation in a grant or lease of modern times. It is not necessarily confined to the best beast, and practically does not differ from the reservation of an additional rent. It is often described as rent service, but should be distinguished therefrom, as is it not a service arising from tenure. The lord cannot seize for suit heriot, but must either bring an action for non-payment or distrain for it (*Edwards* v. *Mosely*, 1739, Willes, 192).

Heriot custom is a heriot due by virtue of the immemorial usage of a certain place or district. It is usually an incident of copyhold manors, but is sometimes found as an incident of freehold manors, subject to customary rules. Under heriot custom a heriot is due from every tenant on death or alienation or on alienation only. Heriot custom is varied in its incidents, and is not confined to the best beast or to animals generally. In some cases it has been commuted from ancient times to a sum of money. The lord cannot distrain for heriot custom, but he may seize the heriot in any place; and when a beast is due to the lord by heriot custom, it may be seized without the manor, although it has never been within the manor (*Western* v. *Bailey, supra*; see also *Parker* v. *Gage*, 1688, 1 Show. 81, Holt, 337). But where heriot custom is the render of a beast, and the tenant has not any beast at the time of render or alienation, or only holds it as a partnership asset, the lord's right is lost, and this will also apply to heriots due by heriot service. The best remedy for the lord in all cases where he cannot seize is by action in the nature of detinue. An action of the nature of a *qui tam actio* (13 Eliz. c. 5, s. 3) may be brought by a lord who is deprived of his heriot by a fraudulent conveyance.

Heriots are due on the death of a reversioner, of a trustee (but not of a *cestui-que trust*), of a disseisor, until the entry of the disseisee or heir has been tolled, of the tenant by curtesy or the tenant by dower; but not in the case of joint tenants and coparceners, as they make together but one tenant.

Tenants in common are, however, in a different position, as they are solely seised. Therefore when a tenement becomes the property of several as tenants in common, the lord is entitled to a heriot from each of them; but if the several portions are reunited in the person of one tenant, only one heriot is payable in respect thereof (*Attree* v. *Scott*, 1805, 6 East, 476; *Garland* v. *Jeckyll, supra*; *Holloway* v. *Berkely*, 1826, 6 Barn. & Cress. 2; 30 R. R. 228). Multiplication of heriots means that where a heriot is due by custom on alienation, it is multiplied by the tenant's alienation either of part of his interest in the land or of the land itself. On this question further, see Scriven, pp. 253 *et seq.*; Elton, pp. 204, 208.

It may be necessary in certain cases (*e.g.* where allotments and exchanges have been made under Inclosure Acts, and the tenant refuses to pay) for the lord to prove the tenant's seisin of some part of the lands (*Mayor of Basingstoke* v. *Lord Bolton*, 1854, 3 Drew. 52).

As to the Statutes of Limitations, a seizure by the lord for heriot custom or heriot service is not an entry or distress or bringing an action to recover rent within the meaning of the Statute of Limitations (3 & 4 Will. IV. c. 27, ss. 2, 3, and 34; see also s. 42); and it is therefore doubtful, although in sec. 1 of that Act it is provided that the word "rent" shall extend to all heriots, whether the Statutes of Limitations apply to heriots (*Lord Zouche* v. *Dabliac*, 1875, L. R. 10 Ex. 172; *Owen* v. *De Beauvoir*, 1847, 16 Mee. & W. 547).

It is probable, however, that, if the lord does not enforce his rights to a particular heriot within six years, he loses it.

As to husband and wife in respect to heriots tenure, see HUSBAND AND WIFE.

Heriots will be extinguished on enfranchisement or extinguishment of copyhold tenure. As to which, see article COPYHOLD.

The Copyhold Act, 1894, s. 2, provides that the lord or tenant of any land liable to any heriot may require and compel its extinguishment in like manner as nearly as possible as is provided in that Act for the enfranchisement of copyhold land. See also ss. 3, 6, 49, and 66. See article COPYHOLD.

[*Authorities.*—Stubbs, *Constitutional History of England*, vol. i.; Freeman, *Norman Conquest*, vol. v.; Pollock and Maitland, *Hist. Eng. Law*; Blackstone, *Com.*; Watkins on *Copyholds*; Elton on *Copyholds*, 2nd ed.; Scriven on *Copyholds*, edited by Brown (which last two works contain a full statement of the law on the subject)].

High and Low Water Mark.—See FORESHORE.

High Bailiffs.—See vol. i. p. 451; vol. iii. p. 530.

High Constable.—See CONSTABLE and CONSTABLE AND MARSHAL.

High Court.—See SUPREME COURT; DELEGATES, HIGH COURT OF.

Highness.—A title of honour given to princes and certain other persons of high rank. In this country it belongs exclusively to members of the Royal Family. Prior to the reign of Henry VIII. the sovereign himself was called Highness, but that monarch adopted the title of Majesty, which has been used by English sovereigns ever since. The title Highness is, however, used by some princes exercising sovereign powers, as, for example, the Khedive of Egypt.

Highroad.—See HIGHWAYS, *infra*, p. 185.

High Seas.—See COLLISIONS AT SEA; SALVAGE; NECESSARIES.

High Steward.—See LORD HIGH STEWARD.

High Treason.—See TREASON.

Highway Authority.—Prior to the passing of the Local Government Act, 1894 (56 & 57 Vict. c. 73), highway authorities in England and Wales were of many different kinds, and so were the areas controlled by such authorities. The main highway areas were—

(i.) The highway parish;
(ii.) The highway district; and
(iii.) The urban sanitary district.

The first two were always rural areas. Then, in addition to this list, the six counties of South Wales had till 1888 (see s. 13 of the Local Government Act of that year) a special highway organisation of their own under Acts of 1844 and 1860. The Isle of Wight also had its special constitution (*ibid.* s. 12). The metropolis, too, was excluded from the operation of the general Acts. There were also other places and towns which

had special Acts, varying, or adding to, the highway powers, which the local authority would otherwise have possessed.

The highway authority in a highway parish was the surveyor of highways, in a highway district the District Highway Board, in an urban sanitary district the local Board of Health.

(i.) *The Highway Parish.*—At common law the duty of maintaining and repairing highways lay upon the parish. If the inhabitants of the parish neglected this duty, they might be indicted. This general rule was subject to two exceptions, which are still preserved—first, a particular individual might be bound *ratione tenuræ* to repair the public roads passing through his property; and, secondly, a particular individual, or even a township or hamlet, might *ratione tenuræ* be exempt from the general duty The Highway Act of 1835 (5 & 6 Will. IV. c. 50) adopted the common law for its basis, and provided the machinery by which the parish was to perform its duties. The vestry was required to appoint a surveyor, who held office for a year, and was liable to a penalty if he refused to act. The vestry might, if they thought fit, vote him a salary (s. 9); and this became the usual course. The surveyor might appoint a deputy, and by leave of the vestry he might appoint a collector. It was his duty to see that the roads were properly maintained, and with the sanction of the vestry he might enter into contracts for their repair. It was also his duty to assess and levy the necessary highway rate. If the vestry did not appoint a surveyor, it was the duty of the justices to appoint some person to the office. The paid surveyor was generally a professional man of skill and experience in such matters.

The highway parish did not necessarily coincide with the poor-law parish. By custom, a particular township or hamlet which was part of a poor-law parish was for highway purposes a separate parish. In short, any parish, township, or place which maintained its own highways was a highway parish. Thus, in Shropshire, there were 740 highway parishes, but only 224 poor-law parishes. In parishes where the population exceeded 5000, the vestry might appoint a Board to discharge their functions in respect of highways. This Board was in effect a committee of the vestry; but there were never apparently more than nine such Boards.

(ii.) *The Highway District.*—Under the Highway Acts of 1862 and 1864 (25 & 26 Vict. c. 61; 27 & 28 Vict. c. 101) power was given to the Quarter Sessions to combine parishes into highway districts. In the exercise of these powers, highway districts, comprising about 8000 highway parishes, were created. Unfortunately, these districts seldom coincided with either the unions or the petty sessional divisions or the sanitary districts; but were a fresh collocation of parishes. A District Highway Board was composed of the justices resident in the district, and of a number of way wardens elected by the several combined parishes. No one could serve as a way warden, unless he lived in the parish or an adjoining parish, and

(*a*) had an estate in land or houses within the parish in his own right, or in right of his wife, of the yearly value of £10; or

(*b*) had a personal estate of the value of £100; or

(*c*) was the occupier or tenant of land or a house of the yearly value of £20.

A Highway Board discharged all the duties both of a surveyor of highways and also of the vestry which appointed that surveyor. And additional powers were also conferred on a Highway Board; it might raise a loan and appoint other officers besides a surveyor; the vestry could do neither of these things. Thus, in addition to a district surveyor, the Board appointed a treasurer, a clerk, and sometimes also an assistant surveyor. The expenses incurred by a Highway Board were borne, partly by a common fund, partly

by the different parishes. The common fund was formed by contributions in proportion to the poor-law valuations of the several parishes. The amount of the contribution so due from a parish and that of its separate charges for its own roads were levied by a precept. If the parish was not a poor-law parish, the precept went to the way wardens, and the amount was raised by them by a separate highway rate. In other cases the precept went to the overseers, and the amount was paid out of the poor-rate. The accounts of every Highway Board were audited by the Local Government Board.

(iii.) *The Urban Sanitary District.*—Highway Boards were at first very popular; as many as 424 were created. But, as the local sanitary authority grew in importance and power, and its efficiency became more and more obvious, the ratepayers began to doubt the necessity for another local authority, with an area of much the same size, and a separate staff of clerks and officers. By sec. 144 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), it was enacted that every urban authority should, within its district, exclusively of any other person or authority, execute the office of, and be, the surveyor of highways, and have, exercise, and be subject to, all the powers, authorities, duties, and liabilities of a surveyor of highways and also of the parish vestry by which such a surveyor was appointed. The urban sanitary authority thus became itself "the surveyor of highways" for the district; their surveyor is only, so to speak, a deputy surveyor, with power to perform all *ministerial* acts required by any Act of Parliament to be done by a surveyor of highways.

In further pursuance of the same policy, the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), contained a clause (s. 4) dealing with rural districts and enabling any rural sanitary authority, whose area coincided with the area of a highway district, to apply to the justices to transfer to it the powers of the Highway Board. If the justices thought fit to make such an order, the Highway Board ceased to exist, and its powers were transferred to the guardians. But this power was not largely used, as the guardians had already quite enough to occupy their time in the administration of the poor law. Only forty-one Boards of Guardians took over highway powers.

(iv.) *Parish Councils.*—In this way the control of the highways was to a very considerable extent taken away from the officers of the highway parish and vested in various Boards; but there still remained in 1894 about 5000 highway parishes which maintained their own roads. But the Local Government Act passed in that year (56 & 57 Vict. c. 73, s. 25 (1)) put an end to all existing highway authorities, so far as any rural district was concerned. Power was given, it is true, to the County Council to postpone the operation of this Act for three years from the day when the first District Council came into office, or for such further period as the Local Government Board may, on the application of the County Council, allow. But, except in some forty-five instances in which the Local Government Board has exercised this power, all Highway Boards have ceased to exist, all highway parishes have ceased to repair their own roads, and no more surveyors of highways will be appointed by any vestry.

The newly-created Parish Council is not, speaking generally, a highway authority at all, it rather takes the place of the vestry. It has the very important right of vetoing the stopping-up or the diversion of any public right of way (see *post*, p. 197); it may refuse to consent to a declaration that any public highway is unnecessary (see *post*, p. 191); it may make a representation to the District Council (and if that be ineffectual, to the County Council), complaining of the stoppage or obstruction of any right

of way in the parish or in any adjoining district (L. G. Act, 1894, s. 26 (4)). In all other highway matters the District Council now acts, without obtaining the consent of any vestry, parish council, or parish meeting (see *Dyson* v. *Greetland Local Board*, 1884, 13 Q. B. D. 946). Thus a Parish Council is not bound to maintain any highway in the parish. There is one case—and only one—in which a Parish Council may, if it thinks fit, employ its funds in maintaining a highway; it may, subject to the restrictions on expenditure imposed by the Act (s. 11), undertake the repair and maintenance of all or any of the public footpaths within the parish, not being footpaths at the side of a public road; but neither the existence nor the exercise of this power will relieve the District Council from its general liability to repair and maintain such paths (s. 13 (2)).

(v.) *District Councils.*—The District Council is now, speaking generally, the highway authority in all parts of England and Wales. By sec. 25 of the L. G. Act, 1894, every District Council, whether urban or rural, has, as respects highways, all the powers, duties, and liabilities of a surveyor of highways appointed by the vestry under the Highway Act, 1835, and of the vestry itself under that Act or any Act amending the same, and also of an urban sanitary authority under secs. 144–148 of the Public Health Act, 1875. The Rural District Council of any district in which there formerly existed a Highway Board under the Highways Acts, 1862 and 1864, has also all the powers and duties and liabilities of such a Board which, as we have seen, were in some respects larger than those of a surveyor of highways. The Legislature, no doubt, intended to confer on every District Council all the powers, duties, and liabilities of a Highway Board; but the language of the section leaves it at least doubtful whether this presumed intention has been carried out with respect to any district in which the highway authority prior to 1894 was a surveyor of highways and not a Highway Board. The Local Government Board may, however, confer on any Rural District Council, on its application, any of the powers possessed by an Urban District Council as to highways (Public Health Act, 1875, s. 276).

It is the duty of every District Council to protect all public rights of way, and to prevent, as far as possible, the stopping or obstruction of any such right of way, whether within its district or in an adjoining district in the same county, whenever such stoppage or obstruction would, in its opinion, be prejudicial to the interests of its district; it is also the duty of every District Council to prevent any unlawful encroachment on any roadside waste within its district (L. G. Act, 1894, s. 26, subs. (1)).

(vi.) *County Council.*—Prior to 1888 all main roads (see HIGHWAYS, *post*, p. 193) and all county bridges were repaired by the highway authority of each parish or district, but the justices always repaid one-half of the expense out of the county funds, if such repairs were done to the satisfaction of the county surveyor. Now, however, by sec. 11 of the Local Government Act, 1888, all main roads in a county and all county bridges are vested in, and must be repaired and maintained by, the County Council, except such as an Urban District Council may elect to retain under its own control. The County Council may either itself maintain and repair a main road, or it may require the District Council in whose district such main road lies to undertake these duties in consideration of an annual payment to be agreed upon or settled by arbitration. Any main road which an Urban District Council retains under its control vests in it in the same way as any ordinary high road, and in that event the County Council pays the Urban District Council an annual contribution, the amount of which must be agreed between them, or determined by the Local Government Board

after inquiry (s. 11 (2), (3)). And whenever any part of a main road is out of repair, and the duty of repairing it rests on a District Council, the County Council may give notice requiring the road to be placed in proper repair, and, if this is not complied with, may itself do the repairs, and the expense will be a debt due from the District Council to the County Council (s. 11 (8)).

In any county in which some of the bridges are repairable by the hundred, the County Council may, by order, declare that some portions of a main road (*e.g.* the main road leading up to and over such a bridge) shall be repairable by the same hundred, and the expenses of repairing so much of the main road must then be raised in the same way as the expense of repairing the hundred bridge (H. & L. (Amendment) Act, 1878, s. 20; L. G. Act, 1888, s. 11 (13)). A declaration by the County Council under sec. 15 of the Highways and Locomotives (Amendment) Act, 1878, that a certain road shall henceforth be a main road, will not take effect until the road has been placed in proper repair by the District Council to the satisfaction of the County Council (L. G. Act, 1888, s. 11 (7)). A County Council may make an agreement with any highway authority as to the construction or improvement or the freeing from tolls of any main road or bridge wholly or partly within its district (Highways and Bridges Act, 1891 (54 & 55 Vict. c. 63), s. 3). A County Council may also, if it think fit, contribute towards the costs of the maintenance, repair, enlargement, and improvement of any highway or public footpath in the county, although the same is not a main road (L. G. Act, 1888, s. 11 (10)). A County Council may also purchase or take over on terms agreed existing bridges not at present county bridges, and erect new bridges, and maintain, repair, and improve any bridges so purchased, taken over, or erected (s. 6). And all costs of repairing and maintaining main roads and county bridges will be charged to the general county account (s. 11).

Highways.

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I. The Nature and Extent of the Right.

Various Kinds of Highways.—A highway is a way along which the public generally has a right to pass. If the public has a right to pass on

foot only, the way is a public FOOTPATH; if the public has a right to ride or lead a horse along the way, it is a BRIDLE-PATH (*q.v.* vol. ii. p. 247); if the public has a right to drive cattle along the way, it is a DRIFT-WAY (*q.v.* vol. iv. p. 359); if the public has the right to drive in carts or carriages along the way, it is a HIGHROAD. In each case the extent of the right of the public is determined principally by antecedent user (*Ballard* v. *Dyson*, 1808, 1 Taun. 279; 9 R. R. 779; *Hemming* v. *Burnet*, 1852, 8 Ex. Rep. 187). Such a right is in no case an easement; for there is no dominant tenement. It is a public right, enjoyed by all subjects of the Crown. Hence an occupation road, or any other private way, is not a highway; nor, as a rule, is a railway. A navigable river may be, a tidal navigable river generally is, a highway; a walk or towing-path along the bank of a river may be a highway (*Greenwich Board of Works* v. *Maudsley*, 1870, L. R. 5 Q. B. 397; *Grand Junction Canal Co.* v. *Petty*, 1888, 21 Q. B. D. 273); so may a bridge over a river. A highway is not necessarily a *thoroughfare* (see *Bailey* v. *Jamieson*, 1876, 1 C. P. D. 329; and CUL DE SAC, vol. iv. p. 56). A street is almost always a highway; but not necessarily so. The definition of a "street" in the Public Health Act, 1875, and the Metropolis Management Act, 1855, is so wide that it is possible for a carriage-way to be a "street," though it has never been dedicated to the use of the public (*St. Mary, Islington* v. *Barrett*, 1874, L. R. 9 Q. B. 278; *Midland Ruy. Co.* v. *Watton*, 1886, 17 Q. B. D. 30; *Arter* v. *Vestry of Hammersmith*, [1897] 1 Q. B. 646; and see STREET). But every way which is open as of right to all the king's subjects is a highway, whether the expense of repairing and maintaining it falls on the rates or not.

Ownership of the Soil.—The right of the public is merely to pass and repass along the way, pausing only for such time as is reasonable and usual when persons are using a highway as such (*Harrison* v. *Duke of Rutland*, [1893] 1 Q. B. at p. 146). The soil remains the property of the freeholder, who is generally the owner of the adjoining land. If the land on each side of the highway belongs to different owners, the presumption is that each adjoining owner owns the soil of the highway *usque ad medium filum*; but this presumption may be rebutted by evidence of the circumstances in which the highway was created, or the grant of the adjoining land was made (*Beckett* v. *Corporation of Leeds*, 1872, L. R. 7 Ch. 421; *Leigh* v. *Jack*, 1879, 5 Ex. D. 264; *Duke of Devonshire* v. *Pattinson*, 1887, 20 Q. B. D. 263; *Pryor* v. *Petre*, [1894] 2 Ch. 11). In the case of a street repairable by the inhabitants at large, the soil under the street is, by secs. 4 and 149 of the Public Health Act, 1875, vested in the Urban District Council, or other highway authority, but only so far as is necessary for its use by the public as a highway, or for any other of the purposes of the Act (*Baird* v. *Tunbridge Wells*, [1896] App. Cas. 434; and see STREET). But subject to the right of the public or the highway authority, the soil and the herbage remain the property of the freeholder; he is "in possession and occupation" both of the soil and the surface (*R.* v. *Pratt*, 1855, 4 El. & Bl. 860; 24 L. J. M. C. 113); he may use both for his own purposes in any manner not inconsistent with such right (*St. Mary, Newington* v. *Jacobs*, 1871, L. R. 7 Q. B. 47); and may maintain an action against anyone who trespasses thereon or depastures it with cattle (*Sir John Lade* v. *Shepherd*, 1733, 2 Stra. 1004; *Stevens* v. *Whistler*, 1809, 11 East, 51; *Harrison* v. *Duke of Rutland*, [1893] 1 Q. B. 142), or makes a tunnel or lays pipes under it (*South* v. *E. L. Ruy. Co.*, 1874, 22 W. R. 566; *Goodson* v. *Richardson*, 1874, L. R. 9 Ch. 221). The soil of a highway

may be subject to a private right of way coexistent with the right of the public (*Brownlow* v. *Tomlinson*, 1840, 1 Man. & G. 484); and by special custom the right of the public to pass and repass may be subject to temporary interruption, *e.g.* by the erection of booths during a fair (*Elwood* v. *Bullock*, 1844, 6 Q. B. 383).

Extent of the Right of the Public.—The right of the public extends over the whole width of the highway, and not merely over the part which is metalled or trodden down (*Fowler* v. *Sanders*, 1618, Cro. (2) 446). This is so whether the highway in question be a carriage-road, or only a foot-way or bridle-path (*Pullin* v. *Deffel*, 1891, 64 L. T. 134). Thus, where an electric telegraph company without legal authority erected telegraph poles in a permanent manner on the waste at the side of a highway, leaving room enough for the use of the highway, and not affecting either the metalled road or the footpath by the side of it, this was held to be a public nuisance, because the company had thus obstructed a small portion of space which the public had a legal right to use (*R.* v. *United Kingdom Telegraph Co.*, 1862, 3 F. & F. 73; 31 L. J. M. C. 166). And it makes no difference that trees, bushes, furze, etc., have for a period of twenty-five years or more been allowed to grow up to within a few feet of the metalled part of the highway (*Turner* v. *Ringwood Highway Board*, 1870, L. R. 9 Eq. 418). Further, as to the rights of the public over such roadside wastes, see, *post*, p. 197.

Right of the Public to Deviate.—It has been laid down in more than one ancient case that whenever a highway becomes so out of repair as to be what is called "founderous," the public have a right to pass and repass over the adjacent soil, whether enclosed or not. But this alleged right is very doubtful; it probably exists only, if at all, in cases where the owner of such adjacent soil is under an obligation to keep the soil of the highway in repair and has neglected so to do, or has himself obstructed the highway (see *Arnold* v. *Holbrook*, 1873, L. R. 8 Q. B. 96, and *Dawes* v. *Hawkins*, 1860, 8 C. B. N. S. 848; 29 L. J. C. P. 343). Clearly there is no such right when a private way is obstructed or allowed to become impassable. And there is another distinction between a public and a private right of way. The owner of land adjoining a public highway is entitled to erect gates or open doors so as to give him access to the highway at any point he pleases, whether the soil of the highway be his or not (*Marshall* v. *Ulleswater Steam Navigation Co.*, 1871, L. R. 7 Q. B. 166; 25 L. T. 793; *Ramuz* v. *Southend Local Board*, 1892, 67 L. T. 169). The owner of land adjoining a private way may not do this.

II. How such a Right is Created.

A public right of way can of course be created by statute (see *Cubitt* v. *Maxse*, 1873, L. R. 8 C. P. 704). Otherwise it comes into existence only by what is called a dedication to the public. The public cannot take by grant, though the inhabitants of a village or parish may (*Vestry of Bermondsey* v. *Brown*, 1865, L. R. 1 Eq. 204; 35 Beav. 226).

Dedication.—A dedication may be express: a man may write a letter to the newspapers inviting the public to use his new road. But this seldom happens. A dedication is generally to be implied from the conduct of the owner of the soil. Thus if a freeholder makes a new road joining two existing highways, and builds houses on both sides of it, and leaves it open and unfenced at both ends, and never seeks to prevent the public from using it, the presumption is irresistible that he intended to make it a public road. The exact moment at which the right of the public attaches

depends on the circumstances of each case. These may be so unequivocal that a dedication takes place immediately. Usually, however, the presumption only arises after a certain length of time, during which the public have enjoyed an uninterrupted user of the way. The acquiescence of the freeholder in such user is strong evidence that he intended to dedicate the road to the use of the public; and if such acquiescence continues for a substantial length of time, it will be sufficient to create a highway. Eight years, and even eighteen months, has been held long enough (*North London Ruy. Co.* v. *St. Mary, Islington*, 1872, 21 W. R. 226, though in this case there was some evidence of an express dedication). In all such cases, however, the presumption of dedication may be rebutted by the special circumstances of the case. Thus placing a bar across the entrance to a new street rebuts the presumption which would otherwise arise from the fact that the new street opened into an ancient highway; and this is so even though the bar be promptly knocked down (*Roberts* v. *Karr*, 1808, 1 Camp. 262 *n.*).

Who can Dedicate.—Strictly only the owner of an estate in fee-simple in possession can dedicate a way to the public. A tenant for life or for a term of years may by his conduct give the public a right as against himself, but not so as to bind the inheritance or the reversion. Though where there has been a succession of tenants, and it was notorious that the public were using the way as of right during each successive tenancy, the consent of the landlord may be presumed (*R.* v. *Barr*, 1814, 4 Camp. 16). A dedication can be presumed against the Crown as readily as though the land belonged to a private person (*R.* v. *East Mark*, 1848, 11 Q. B. 877; *Turner* v. *Walsh*, 1881, 6 App. Cas. 636). A corporation or other public body may dedicate, provided that the dedication suggested is not *ultra vires* or inconsistent with the purposes for which they exist (*Grand Junction Canal* v. *Petty*, 1888, 21 Q. B. D. 273). That the public accept the dedication is shown by their using the way. The consent of the *parish* need not be shown; this never was necessary, even when the parish were *ipso facto* bound to repair every highway from the moment it was dedicated to the use of the public (*R.* v. *Inhabitants of Leake*, 1833, 5 Barn. & Adol. 469).

Limited or Qualified Dedication.—A highway, as we have seen, is not necessarily a carriage-way. The person dedicating may confer on the public the right to use the way as a footway, bridle-path, or drift-way only. He may also, by contemporaneous acts, limit the user of the way to certain times or seasons (*e.g.* he may grant the public the right to use his bridge whenever it is dangerous to cross by the ford (*R.* v. *Inhabitants of Northampton*, 1814, 2 M. & S. 262)). Or he may reserve to himself the right to periodically plough up the soil of the way (*Mercer* v. *Woodgate*, 1869, L. R. 5 Q. B. 26; *Arnold* v. *Blaker*, 1871, L. R. 6 Q. B. 433; *Arnold* v. *Holbrook*, 1873, L. R. 8 Q. B. 96). But though he may thus restrict the user, he may not limit the number of persons who may use the way. *E.g.* a dedication to the inhabitants of a parish or to any other limited portion of the public is void, and confers no right on anyone (*Vestry of Bermondsey* v. *Brown*, *supra*): though such a right may be created by grant or, it is said, by custom (*Co. Litt.* 110 *b*, 56 *a*). Nor can a dedication be limited in respect of the duration of the right; every dedication is necessarily in perpetuity. Nor can a dedication, in the absence of statutory authority, be made subject to the payment of a toll (*Austerberry* v. *Corporation of Oldham*, 1885, 29 Ch. D. 750). But if, at the time of dedication, there exists in or near the highway an obstruction, such as trees or projecting steps, or an excavation, such

as a cellar covered with a flap, it will be presumed that the dedication is subject to any such obstruction or excavation which existed at the time of dedication, though it renders the way incommodious and even dangerous for passengers. And though such obstruction or excavation would be an actionable nuisance, had it been placed there subsequently, its presence does not make the dedicator liable for damages if anyone using the way is injured (*Le Neve* v. *Mile End Old Town*, 1858, 8 El. & Bl. 1054; 27 L. J. Q. B. 208; *Fisher* v. *Prowse*, 1862, 2 B. & S. 770; 31 L. J. Q. B. 212). But a man who has dedicated a way cannot make any use of the adjoining land that would make the way dangerous; if, after dedication, an excavation be made so near the way as to be a nuisance, he must fence it off (*Barnes* v. *Ward*, 1850, 9 C. B. 392).

III. How such a Right is Lost.

A public right of way cannot be lost by abandonment or non-user; the public retain the right, though they may not have occasion to exercise it. Again, a public right of way cannot be released or alienated; for there is no body or person who can grant away the property of the public. Hence, at common law the maxim was, "Once a highway, always a highway"; for the law knew no presumption or prescription to extinguish such a right. Still, of course, an Act of Parliament can by express words or necessary implication destroy a highway (*Corporation of Yarmouth* v. *Simmons*, 1878, 10 Ch. D. 518). And if the soil along which the way runs is destroyed by a landslip or washed into the sea, the right of the public will be suspended until such time as it again becomes possible to pass that way (*R.* v. *Hornsea*, 1854, 23 L. J. M. C. 59; *R.* v. *Greenhow*, 1876, 1 Q. B. D. 703). So if a navigable river changes its course, the right of the public is by the act of God diverted to the new channel. And, in former days, a highway could apparently be diverted by proceedings taken under an old writ of *ad quod damnum*, by means of which the sanction of a sheriff's jury could be obtained to the diversion. But such proceedings now are obsolete.

Certificate of Justices.—And now by secs. 84–92 of the Highway Act, 1835 (5 & 6 Will. IV. c. 50, as amended by the L. G. Acts, 1888 and 1894), two justices may, at the instance of either a District or a Parish Council, with the consent of both bodies, and after certain formalities and certain advertisements, "stop, divert, or turn" a highway. The prior consent of both the Parish and the District Council is now necessary (L. G. Act, 1894, s. 13 (1)). Any inhabitant who wishes to stop up, divert, or turn a highway may bring the matter before either of these bodies in the form of a written proposal; he generally begins with the District Council, as that is now the highway authority. (See Highway Authority, *ante*, p. 183.) Or either of these authorities may of its own initiative take such a matter into its consideration. In either case, unless both Councils agree that it is expedient that the highway should be stopped up, diverted, or turned, either entirely or with the reservation of a footway or bridle-path, the matter drops. The only ground on which a highway can be stopped is that it is unnecessary. The only ground on which a highway can be diverted is that the proposed new way is "nearer or more commodious" than the existing way. If, however, both Councils pass a resolution in favour of stopping up or diverting the highway, a further proceeding is rendered necessary by sec. 13 (1) of the L. G. Act, 1894. The Parish Council must give public notice of such resolution in the manner directed by sec. 51 of that Act. And the resolution will not operate (*a*) unless it is confirmed by the Parish Council at a meeting held not less than two months after the public notice is given; nor

(*b*) if a parish meeting held before such confirmation resolve that the consent ought not to be given.

As soon as the resolution has been carried in both Councils—it is not necessary, though it may be expedient, to wait to see whether the resolution of the Parish Council will be confirmed, or whether it will be vetoed by a parish meeting—the clerk of the District Council applies to two justices to view the way. The two justices must themselves go over the ground together (*R.* v. *Cambridgeshire*, 1835, 4 Ad. & E. 111; *R.* v. *Wallace*, 1879, 4 Q. B. D. 641). If it appears to them upon such view that the existing highway is unnecessary, or that the proposed new highway is nearer or more commodious to the public, and the owner of the land over which the new highway is intended to be made consents in writing to the diversion, then notices stating the details of the proposed alteration must be posted "at the place and by the side of each end of the highway from whence the same is proposed to be diverted, and turned or stopped up" (see *R.* v. *Surrey*, 1870, L. R. 5 Q. B. 466; *R.* v. *Surrey*, [1892] 1 Q. B. 867). A similar notice must be advertised in a local paper for four successive weeks, and posted on the church-door of every parish in which the highway lies for four successive Sundays. The justices, then, must wait till the prescribed period of "not less than two months after public notice is given" of the resolution of the Parish Council. As soon as that resolution has been duly confirmed, without any veto from a parish meeting, and the justices are satisfied that all necessary notices have been duly published, and a plan of the old and proposed new highways has been delivered to them, they must make their certificate, stating their reasons, and setting out the due performance of all conditions precedent required by the Act of 1835. This certificate must be lodged with the clerk of the peace for the county, and be read by him in open Court at the Quarter Sessions held next after four weeks from the day of its being so lodged, and then be enrolled, with the other documents, among the records of the county (5 & 6 Will. IV. c. 50, s. 85).

Any person aggrieved by the certificate may appeal to the said Quarter Sessions. He must give the District Council fourteen days' notice of his appeal, accompanied by a statement of the grounds of appeal. Upon the appeal, a jury decides whether the old highway is unnecessary, or whether the proposed highway is nearer or more commodious, and whether the appellant is aggrieved. If there is no appeal, or the appeal is dismissed, the Court must make an order that the old highway be stopped or diverted, and the ground for the new road purchased. And as soon as the new road is made and completed to the satisfaction of two justices, it at once becomes a public highway, and the former highway is stopped. If the proceedings were initiated by a private person, he must pay all the costs of the view, notices, etc.; if not, the District Council pays them. The costs of any appeal follow its event (s. 90).

If several highways be so connected together that they cannot be separately stopped or diverted without interfering one with the other, they may all be included in one order or certificate (s. 86). A certificate affecting several highways may, on appeal, be confirmed in part and quashed in part (*R.* v. *Midgley Local Board*, 1864, 5 B. & S. 621; 33 L. J. M. C. 188). A cross-road will by necessary implication cease to be a highway, if every road with which it communicates has been lawfully stopped or diverted, so that no one can have access to the cross-road without committing a trespass (*Bailey* v. *Jamieson*, 1876, 1 C. P. D. 329).

Inclosure Acts.—By sec. 62 of the General Inclosure Act, 1845 (8 & 9 Vict.

c. 118), power is given to the valuer acting in the matter of any inclosure to set out and make public roads and ways, and to stop up, divert, or alter any of the roads or ways passing through the land to be inclosed, or through any old inclosures in the parish in which the land to be inclosed is situate; and this power is not confined to roads passing through old inclosures or intakes from the waste or common inclosed, but extends to roads passing through any old inclosures within the parish (*Hornby* v. *Silvester*, 1888, 20 Q. B. D. 797).

IV. Repair of Highways.

At common law it is the duty of the inhabitants of each parish to maintain and repair all highways within it. There is no escape from this liability. No contract will free the parishioners from it. It may be suspended, if for any reason the burden can be shifted on to others; but it revives as soon as the liability of those others ceases (*R.* v. *Oxfordshire*, 1825, 4 Barn. & Cress. 194). And in spite of all the changes introduced by the various Local Government Acts, if a "highway repairable by the inhabitants at large" be out of repair, the proper course is still to indict the inhabitants of the parish.

Ratione tenuræ, etc.—There were at common law only three cases in which the duty of repairing a highway could be primarily placed elsewhere—

1. *By prescription*, the duty of repairing a particular road may be cast on some person or corporation. But there must be some consideration for such a liability, *e.g.* some land adjacent to the way held on the tenure of performing such service. An unincorporated body which is incapable of holding land (such as the parishioners of an adjoining parish) cannot be liable to repair a highway *ratione tenuræ*. Such a liability is generally established by proof that the present or former occupier of that land has actually repaired that highway; but such evidence is only presumptive, and may be rebutted. The liability once established attaches to the land into whosever hands it may come. But the person liable may make an arrangement with the highway authority to take over the repair of the highway on terms (Highway Act, 1835, s. 62; Public Health Act, 1875, s. 148). If no such arrangement be made, and a highway repairable *ratione tenuræ* falls into disrepair, the District Council, after due notice given and request made to the person liable, may itself repair the highway and recover the cost from that person (L. G. Act, 1894, s. 25 (2)). Such a liability will cease if a highway authority under its statutory powers so alters the nature and course of the road as to practically destroy the former highway (*R.* v. *Barker*, 1890, 25 Q. B. D. 213; but see s. 93 of the Highway Act, 1835).

2. *By custom*, the inhabitants of a particular township or tithing, as distinct from the whole parish, may be bound to repair that portion of a highway which lies within their own boundary (see *R.* v. *Ecclesfield*, 1818, 1 Barn. & Ald. 348; 19 R. R. 335).

3. If a highway ran over open land, and the occupier of the land subsequently enclosed the road, he is liable to repair it *ratione clausuræ* so long as the enclosure exists; because, it was said, he had deprived the public of their right to deviate over his land, should the way become impassable. But now if the enclosure be made with the written consent of the parish, no such liability will attach (Highway Act, 1862, s. 46).

"Taking over" a Highway.—Unless the liability could thus be cast on others, the inhabitants of each parish prior to 1836 were bound to repair every highway in their parish, ancient or modern. The amount of money requisite for this purpose was raised by a highway rate which was levied

on all property in the parish rateable to the relief of the poor, and also on woods, mines, and certain sporting rights. It was thus in the power of any landowner by dedicating a way to the public to impose on the parish the burden of repairing and maintaining it, without the leave or consent of his fellow-parishioners, and whether the way was of any use to them or not. This was felt to be a hardship. Accordingly by sec. 23 of the Highway Act, 1835, the law was altered, and the general liability of the inhabitants of a parish restricted. They remained liable to repair any road, occupation-way, drift-way, or bridle-path which had been set out and dedicated to public use by a private person or corporation at any date prior to 20th March 1836: but no such liability arose in respect of any new way unless and until certain formalities were gone through and the way accepted ("taken over," it is called) by the parish. The steps which now are necessary before a way dedicated to the public becomes repairable at the expense of the district, are as follows:—

1. Any person who desires to dedicate a way to the public must give three months' notice of his intention to the District Council and to the justices of the division of the county in petty sessions assembled.

2. The District Council must be satisfied that the road is properly made and that it is useful and not unnecessary.

3. The justices must inspect the road, and satisfy themselves that it is properly made and of the proper width (30 feet), and give a certificate to that effect.

4. Their certificate must be enrolled at the next Quarter Sessions, subject to a possible appeal.

5. The public must use the road for twelve months, and during that time the dedicator must himself repair it.

Then at the end of the twelve months it becomes a highway repairable by the District Council.

A District Council may also agree with a landowner who is proposing to make a road in their district and to dedicate it to the public, that it shall on completion become a highway repairable by the District Council; and it will then become such a highway without the intervention of any justices (Public Health Act, 1875, s. 146).

If a road be dedicated to the public after 20th March 1836, and is not "taken over" in either of these ways, it remains a public highway, but no one is bound to repair it. No such duty rests on the dedicator, or on the owner of the soil. The inhabitants of the parish have no duty and no right to repair it; if they do so against the will of the owner of the soil, they commit a trespass (*Eyre* v. *New Forest Highway Board*, 1892, 56 J. P. 517). But an urban sanitary authority may take over a private street which has been properly sewered, levelled, paved, flagged, metalled, channelled, and made good to the satisfaction of its surveyor, under secs. 150, 152 of the Public Health Act, 1875, or sec. 41 of the Public Health Act, 1890, where adopted, or sec. 19 of the Private Street Works Act, 1892, where adopted.

Unnecessary Highways.—But the Act of 1835 was not retrospective. It did not relieve the inhabitants of a parish from the necessity of repairing any existing highway. They were left still liable to repair all highways which were repairable by the inhabitants at large on 20th March 1836. But this liability has since been narrowed. For if an ancient highway has now become unnecessary for public use, proceedings can be taken—with the consent in a rural district of the Parish Council—to have it declared to be no longer repairable by the parish or at the public expense (Highway Act, 1864, s. 21; H. & L. (Amendment) Act, 1878, s. 24; L. G. Act, 1894, s. 13).

But these Acts provide means for reviving the liability of the inhabitants of the parish should the highway again be needed for public use.

District Councils.—The District Councils created by the L. G. Act of 1894 are now, speaking generally, the highway authorities in all parts of England and Wales; and to them the powers, duties, and liabilities of the former surveyor of highways and of the former Highway Boards have been transferred (s. 25; and see *ante*, p. 183). Hence now *primâ facie* the duty of repairing every highway which is repairable at all at public expense lies on the District Council. There are two exceptions:—

(i.) By sec. 13 (2) of the L. G. Act, 1894, a Parish Council may undertake the repair of any public footpath in the parish, not being by the side of a public road; but this will not relieve the District Council from its liability to repair such footpath should the Parish Council fail to perform the duty which it has undertaken.

(ii.) The County Council is primarily liable to repair every "main road" in its county; though in some cases an Urban District Council may voluntarily undertake the duty (see *post*, p. 194).

Non-repair.—For a mere omission to repair the road, the highway authority, apparently, is not liable, even though special damage has been directly caused thereby to the plaintiff (*Young* v. *Davis*, 1863, 2 H. & C. 197; *Cowley* v. *Newmarket Local Board*, [1892] App. Cas. 345; *Thompson* v. *Mayor, etc., of Brighton*, [1894] 1 Q. B. 332; *Municipal Council of Sydney* v. *Bourke*, [1895] App. Cas. 433). The proper remedy for such neglect is a complaint to the Local Government Board under sec. 299 of the Public Health Act, 1875 (*Robinson* v. *Workington Corporation*, [1897] 1 Q. B. 619; *Peebles* v. *Osbaldtwistle Urban District Council*, *ibid.* 625). But if the County Council is satisfied that a District Council has neglected its duty to repair and maintain a highway in its district, it may make an order requiring the District Council to perform this duty within a certain period, and if the work is not then done the County Council may appoint some person to do it, and recover the cost from the defaulting District Council. If the District Council dispute their liability to repair, the County Council may prefer a bill of indictment against them at the next practicable assizes for the county with a view to having the question of liability to repair decided by a jury, the costs of the trial to be borne as the Court may direct (41 & 42 Vict. c. 77, s. 10).

Where a highway repairable *ratione tenuræ* appears on the report of a competent surveyor not to be in proper repair, and the person liable to repair it fails on request to do so, the District Council may do the repairs and recover the expenses from him, under the L. G. Act, 1894, s. 25 (2).

Special Powers of a District Council.—A District Council is invested with wide power to enable it to repair highways at small expense. It may take road material from any common, waste land, river, or brook in a parish without making any payment (Highway Act, 1835, s. 51). It may gather stones off any man's land after one month's notice, paying compensation for any damage done by the carts, but nothing for the stones (s. 53). It may open gravel-pits and quarries to obtain road materials, paying both for the material and the damage done in hauling (s. 54). Such gravel-pits and quarries must be properly fenced, while open, and filled up or sloped down when they are no longer needed (s. 55). It can order the owner or occupier of any adjoining land to grub up and remove any tree, bush, or shrub planted on any highway within fifteen feet of the centre. It may order its surveyor to prune or lop any trees or hedges which overshadow the high-

way too much, and exclude the sun and air (ss. 65, 66); to make, scour, cleanse, and keep open all ditches, gutters, drains, and watercourses in and through any land adjoining a highway (s. 67); and to remove any timber, hay, soil, or rubbish left on a highway so as to be a nuisance (s. 73; *Denny* v. *Thwaites*, 1876, 2 Ex. D. 21; and see ss. 24, 25, 26). An Urban District Council may also by agreement undertake the maintenance, repair, cleansing, and watering of any street or road for which they would not otherwise be liable (Public Health Act, 1875, s. 148). As to level crossings, see RAILWAYS.

Widening Highways.—An Urban District Council may purchase any premises for the purpose of widening, opening, enlarging, or improving any street, or (with the sanction of the Local Government Board) for the purpose of making any new street (Public Health Act, 1875, s. 154). A Rural District Council may, under sec. 47 of the Highway Act, 1864, widen or improve a highway under their control on their own initiative, and may for the purpose acquire the necessary land by agreement. They may also, with the sanction of the Court of Quarter Sessions, borrow money to meet the expense of widening or improving such highway. A County Council has power, if it thinks fit, to contribute towards the cost of the improvement of any highway, although not a main road (L. G. Act, 1888, s. 11 (10)). Any District Council may enter into an agreement with the County Council for the construction, reconstruction, alteration, or improvement of any highway (Highway Act, 1891, s. 3). In certain cases the justices in petty sessions may order narrow highways to be widened (Highway Act, 1835, s. 82); but a bridle-path cannot be enlarged into a carriage-way under this section. When a road is widened or diverted, the parish must, by sec. 93 of the Highway Act, 1835, repair the whole of the widened road or all the new highway, as the case may be, but the justices must, by order, fix the amount to be paid by the persons or corporations, if any, previously liable to repair the old highway.

V. MAIN ROADS.

Turnpike Roads.—Highroads (by which is meant public carriage-ways or cartways) are of two kinds—main roads and ordinary highroads. Main roads are the great arteries along which the main traffic of the country flows; they were formerly known as the "king's highways." The distinction between such main roads and by-roads which only serve a small area, was recognised from the earliest times; but it only became important when the various Turnpike Acts of the last century began to be passed. Under these Turnpike Acts the control of the roads to which they applied was vested in trustees, who were empowered to defray their expenses by collecting tolls. In theory nothing could be fairer than this system of direct taxation. Everyone who used the road contributed towards the expense of maintaining it, and contributed an amount which was in exact proportion to the use which he made of the road. But in practice this system of collecting tolls was found to be costly; and it was certainly annoying to the public. Hence no new turnpike trusts were created, and all the old ones are now at an end: the last toll has been collected, and the Turnpike Acts have all expired.

Main Roads.—Before 1878, when a road ceased to be a turnpike road, it became once more an ordinary highroad. But by an Act of that year, known as the Highways and Locomotives (Amendment) Act (41 & 42 Vict. c. 77, s. 13), it was provided that all roads dis-turnpiked after 1870 should be deemed to be main roads. The Act further provided that the county authority (*i.e.* at that date, the justices in Quarter Sessions; now the

County Council) may declare any important highway (*e.g.* one which is the medium of communication between great towns, or which leads to a railway station) to be a main road (s. 15). On the other hand, such authority may apply to the Local Government Board for an order declaring that a main road or any part of a main road shall cease to be such, and become an ordinary highway (s. 16). But no such order can be made with respect to a main road within a municipal borough without the assent of the Borough Council being first obtained (54 & 55 Vict. c. 63, s. 4). Hence no exact definition of a "main road" can be laid down: one can only say that most main roads were formerly turnpike roads, though many former turnpike roads are not now main roads.

A main road was formerly repaired by the highway authority of each district; but one-half the cost of such repairs was repaid by the justices of the county, provided the road was repaired and maintained to the satisfaction of the county surveyor. Now, however, by sec. 11 of the L. G. Act, 1888, every road in a county which is for the time being a main road, and every bridge carrying such road, if repairable by the highway authority, is to be wholly maintained and repaired by the County Council, except such as an Urban District Council may elect to retain under their own control. Before any such road is taken over by the County Council it must be placed in proper repair by the highway authority to the satisfaction of the county surveyor. An Urban District Council may retain under its own control any main road in its district; and then the duty of repairing, maintaining, and improving such main road and the paved footways, if any, at its sides rests on that Urban District Council; but the County Council makes an annual payment towards the cost of repairing such road and pavements (*Burslem* v. *County Council of Staffordshire*, [1896] 1 Q. B. 24; *County Council of Derby* v. *Matlock-Bath*, [1896] App. Cas. 315). And the County Council may also require any District Council to make a contract with it for the repair of any main road within its district. Should the District Council fail to carry out its contract, the County Council may give them notice to put the road into proper repair, and if this notice be not complied with within a reasonable time, may do the work itself, and charge the District Council with the cost (L. G. Act, 1888, s. 11).

VI. Bridges.

At common law the inhabitants of a county at large were primarily liable to repair all public bridges in the county. This duty was part of the *trinoda necessitas*. But by usage, prescription, or ancient tenure, the duty of repairing a particular bridge may be cast upon a hundred, parish, township, or individual. And if a wholly unnecessary and superfluous bridge was erected by a private individual, the county was not bound to repair it, even though the public used it (*R.* v. *Southampton*, 1852, 18 Q. B. 841). All other bridges were called "county bridges," and the obligation of repairing them, which was laid by the common law upon the county, has since been repeatedly confirmed by statute; see especially the Statutes of Bridges (22 Hen. VIII. c. 5, and 1 Anne, c. 12) and the County Bridges Act of 1803, formerly known as Lord Ellenborough's Act (43 Geo. III. c. 59). The last Act imposed one important restriction in the case of all bridges erected after 24th June 1803; the county was not to be liable for the repair of any such bridge, unless it was built in a substantial manner under the direction or to the satisfaction of the county surveyor (s. 5; *R.* v. *Devon*, 1833, 5 Barn. & Adol. 383; and see *R.* v. *Inhabitants of Southampton*, 1886, 17 Q. B. D. 424; 1887, 19 Q. B. D. 590). Another limitation was

introduced by the Highway Act of 1835, which came into operation on 20th March 1836. Till that date the county was liable, under 22 Hen. VIII. c. 5, s. 7, to repair not only the bridge, but also the approaches to it for a distance of 300 feet on either side. And this liability continues in the case of every bridge which was built before that date. But as regards all bridges built since 20th March 1836, the burden of maintaining the approaches and the roadway supported by the bridge is thrown by sec. 22 of the Act of 1835 on the highway authority, and not on the county.

And now under the L. G. Act of 1888, all county bridges are to be repaired by the County Council; and all business formerly done by Quarter Sessions in respect of bridges and roads repairable with bridges, and all powers vested in the justices of a county by the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), are transferred to the County Council (L. G. Act, 1888, ss. 3 and 11). Any bridge which is not a county bridge must still be repaired as it was before the Act. The duty of repairing a bridge extends to the repair of all the artificial parts of the structure, and includes rebuilding, if necessary; as in the case of the bridge built by Queen Anne at Datchet (*R.* v. *Inhabitants of Bucks*, 1810, 12 East, 192; 11 R. R. 347).

Any County Council may from time to time make and carry into effect agreements with any highway authority or the Council of any adjoining county in relation to the construction, reconstruction, alteration or improvement, or the freeing from tolls, of any bridge (including the approaches thereto), wholly or partly situate within the jurisdiction of any one or more of such bodies (54 & 55 Vict. c. 63, s. 3). A County Council may also purchase or take over, on terms agreed on, existing bridges not at present county bridges, and erect new bridges, and maintain, repair, and improve any bridges so purchased, taken over, or erected (L. G. Act, 1888, s. 6). All costs of repairing and maintaining county bridges are charged to the general county account (s. 11).

As to offences relating to bridges, see BRIDGES, vol. ii. p. 247.

VII. FOOTPATHS AND OTHER RIGHTS OF WAY.

Obstruction.—The L. G. Act of 1894 makes it the duty of every District Council, whether they are the highway authority or not, to protect all public rights of way, whether footpaths, bridle-ways, or roads, and to prevent, as far as possible, the stopping or obstruction of any such right of way, whether within their district or in an adjoining district in the county, whenever such stoppage or obstruction is in its opinion prejudicial to the interests of its district (s. 26 (1)). By subsec. (3) of the same section it may institute or defend any legal proceedings and generally take such steps as it deems expedient for the purpose of carrying the section into effect. And this section applies equally to cases in which footways and bridle-paths have been unlawfully obstructed or stopped either before or after the passing of the Act. Hence where there is clear evidence that the public have in past times enjoyed such rights, the District Council will be entitled to take proceedings to enforce them. There is no limit of time within which public rights must be enforced. Still, where an obstruction has been acquiesced in for a considerable time, there may be great difficulty in obtaining the evidence necessary to establish rights which have not been exercised for so long.

Though this duty is laid on the District Council, which succeeds to the office of surveyor of highways, still it was felt that in many instances the Parish Council might be more vigilant and more anxious to detect any

obstruction of a public right of way. The District Council governs a much larger area, and its members might not have the same personal interest or the same intimate knowledge of the locality as the members of the smaller body. Hence power is given to the Parish Council (or if there be no Parish Council to the Parish Meeting, s. 19 (8)) to "sound the alarm." If such Parish Council or Meeting is satisfied that any right of way within the district in which their parish is comprised or in any adjoining district in the same county has been unlawfully stopped or obstructed, it is empowered by subsec. (4) of sec. 26 to make a representation to that effect to the District Council; and thereupon it becomes the duty of the District Council, unless satisfied that the statements made in such representation are incorrect, to take proper proceedings accordingly. If the District Council refuse or fail to take proceedings in consequence of such representation, the Parish Council may petition the County Council for the county in which the way is situate. The County Council may then, if it thinks fit, take such proceedings as the District Council might have taken in respect to the stoppage or obstruction of the right of way, at the expense of the District Council (s. 26, subs. (4)); but the Legislature did not intend by giving this power to the Parish Council or Meeting in any way to diminish the general duty of the District Council or to restrict its powers to cases in which a representation is made to it by a Parish Council or Meeting under this section. The District Council should take action on information received from any reliable source.

Should the District Council decide to take action, there appear to be three courses open to it—

(1) To direct their surveyor to remove the obstruction;

(2) To indict the person who has caused the obstruction for a misdemeanour; or

(3) To proceed by way of action in the name of the Attorney-General, for which his "fiat" must be obtained in the usual way.

The remedy by indictment will generally be found the quickest and cheapest; as the case can then be tried either at the next assizes or Quarter Sessions in the county, so that the witnesses will not have far to travel. If, however, the case be one of considerable intricacy, it may be preferable to apply for the "fiat" of the Attorney-General. It is only where the public right appears to be quite clear that the District Council should direct their surveyor to remove the obstruction, leaving it to the person who has placed it there to bring an action of trespass if he wishes to question the right of the public. In such a case due notice should first be given to the parties concerned to remove the obstruction themselves.

The owner of the land over which a public footpath lies has the right to maintain existing stiles or swing gates across it, provided they are of a reasonable kind, and are such that the public are not debarred from that use of the footway to which they are entitled. But it will be the duty of the District Council to see that the use by the public of a footpath is not hindered by the erection of any stiles or gates which are substantially less convenient than those which have existed in the past. If it is, such stiles and gates are obstructions.

Legal Diversion or Stoppage of Footpaths.—The L. G. Act, 1894, s. 13, subs. (1), makes the prior consent of both the Parish Council (or of the Parish Meeting, where there is no Parish Council) and the District Council necessary before justices in Quarter Sessions can give their sanction to any proposed diversion or stoppage of a footpath or bridle-way. The

only ground on which such a way can be wholly stopped without the substitution of another way is that it is unnecessary, and the question whether it is or is not unnecessary will therefore at once arise for the consideration of both the parish and the district authorities. Where it is proposed to divert a footpath, the question for consideration will be whether the proposed footpath is or is not nearer or more commodious for the public than the existing one (Highway Act, 1835, ss. 84–92).

If the consent of the Parish Council be asked first, and be given, the District Council may still refuse their consent. But as the District Council is now almost invariably the highway authority, its consent will probably be obtained first, and in that case it will communicate its views to the Parish Council or Parish Meeting in whose parish the footway is situate.

In a parish which has a Parish Council, the Parish Council must give "public notice" of any resolution passed by them giving consent to the stoppage or diversion of a footpath; and the resolution will not operate until it is confirmed by the Parish Council at a meeting held not less than two months after such public notice is given. If in the meantime a parish meeting is held, and a resolution carried that the consent ought not to be given, the resolution cannot be confirmed, and the whole proceeding is at an end (L. G. Act, 1894, s. 13 (1)). A parish meeting may be summoned by the chairman of the Parish Council or by any two parish councillors, or by the chairman of the parish meeting, or by any six parochial electors (s. 45 (3)). A poll must be taken on the question, if it is demanded by one parochial elector present at the meeting (Sched. I. r. 7). The question for the electors at the poll will be whether the assent of the parish should be given to the stopping or diversion of the footpath.

In a parish where there is no Parish Council, the resolution of the Parish Meeting in favour of the stopping or diversion of a footpath must be confirmed at a subsequent meeting of the parish not less than two months after public notice has been given of the resolution passed at the first meeting (s. 19 (8)).

A Parish Council may, subject to the provisions of the Act with respect to limitations on expenditure, acquire by agreement any right of way, whether within their parish or an adjoining parish, the acquisition of which is beneficial to the inhabitants of any part of the parish (s. 8 (1) (*g*)). A Parish Council may also, subject to the like limitations on expenditure, undertake the repair and maintenance of all or any of the public footpaths within their parish, not being footpaths at the side of a public road (s. 13 (2)).

VIII. Roadside Wastes.

In most country roads there is a strip of grass-land left between the road and the fence on either side. The presumption is that this strip belongs to the owner of the adjoining enclosed land, whether freeholder or copyholder (*Steel* v. *Prickett and Others*, 1819, 2 Stark. 463; 20 R. R. 717). But this presumption may be rebutted by evidence of acts of ownership over the land. And if the strip joins two portions of a common or is obviously part of a common, then the presumption is that it also is part of the waste of the manor, and as such the property of the lord, subject to the manorial rights of the commoners (*Grove* v. *West*, 1816, 7 Taun. 39). In some few cases these open strips belong to the District Council (*e.g.* where the road has been laid out under an enclosure award, or under some private Act of Parliament). But to whomsoever the soil may belong, such strips are part of the highway and are subject to the right of the public to pass and repass along them

(*Fowler* v. *Sanders*, 1618, Cro. (2) 446; *Pullin* v. *Deffel*, 1891, 64 L. T. 134).

Such roadside strips, however wide, cannot lawfully be enclosed by the owner of the adjoining land or by the lord of the manor or by any other person. The adjoining owner has no right to straighten the line of his fences by taking in any portion of such a strip. It is sometimes supposed that the right of the public extends only over 30 feet in the middle of the highway, and that the adjoining owner has a right to enclose up to 15 feet from the centre of the road. But this is not the law. The public, unless the contrary be proved, has a right to use the whole space between the opposite fences; and, moreover, the District Council has no power to authorise the enclosure of any portion of such roadside waste. The fact that trees or shrubs have been allowed to grow up on these roadside strips, so as to interfere with their use by the public, does not necessarily destroy such right or justify their enclosure (*Turner* v. *Ringwood Highway Board*, 1870, L. R. 9 Eq. 418).

It is the duty of every District Council to protect such roadside wastes, and to prevent any unlawful encroachment or obstruction thereon (L. G. Act, 1894, s. 26 (1)). It may, for the purpose of performing this duty, institute or defend any legal proceedings, and generally take such steps as it deems expedient (*ibid.* (3)). Should the District Council neglect their duty in this matter, the Parish Council—or if there be no Parish Council, the Parish Meeting (s. 19 (8))—may make a representation on the subject to the District Council, and if this proves unavailing, the Parish Council (or Meeting) may appeal to the County Council. The County Council may then, if it thinks fit, take action in the matter as though it were the District Council (s. 26 (4)). But it must not be supposed that the powers of the District Council are limited to cases in which a representation is made by a Parish Council or Meeting under sec. 26. The duty of the District Council is a general one: it should at once take into consideration any information which it may have received that encroachments have been made on a roadside waste, from whatever source that information may come. Note also that the powers of the District Council are not limited to future encroachments or enclosures of roadside wastes. There is no limit of time imposed on the assertion of the right of the public to the use of roadside wastes. The District Council should therefore consider all encroachments which have been made within recent times; though there will obviously be more difficulty in establishing the right of the public when an encroachment has been acquiesced in for a long period.

The legal remedies in the hands of the District Council, where encroachments on roadside wastes have been made, are the same as in the case of stoppage of footpaths (*ante*, p. 196). Where there is no doubt as to the public right, it will, as a general rule, be advisable to assert the right of the public by removing the obstruction, after due notice to the person who has made the encroachment, leaving it to him to assert his right if he seriously thinks he has one, by an action of trespass.

As regards main roads, the L. G. Act, 1888 (s. 11 (1)), confers on County Councils the necessary powers for preventing and removing obstructions, and for asserting the right of the public to the use and enjoyment of roadside wastes (see *Harris* v. *Northamptonshire County Council*, 1897, 61 J. P. 599). The District Council should therefore, in the case of a main road, call the attention of the County Council to any such obstruction or interference with the public rights in respect of roadside wastes within their district.

IX. Nuisances to Highways.

Action for Damages.—The person who dedicates a highway is not liable, as we have seen, if an injury is caused to anyone using the highway by an obstruction or excavation in or near the highway which existed at the time of dedication (*Fisher* v. *Prowse*, 1862, 2 B. & S. 770). But he cannot subsequently do anything which will render the way less commodious to the public. If he or anyone else subsequently makes and leaves unfenced an excavation so near a highway that the passers-by may without negligence stray into it, such an excavation is a public nuisance, and anyone who does fall into it will have a good cause of action against him (*Barnes* v. *Ward*, 1850, 9 C. B. 392). If a house adjoining a highway be allowed to become ruinous and likely to fall, it is a nuisance to the highway (*R.* v. *Watts*, 1704, 1 Salk. 357). A low wall with spikes on it immediately abutting upon a public highway may be such a nuisance (*Fenna* v. *Clare & Co.*, [1895] 1 Q. B. 199). So, too, it is the duty of anyone who diverts a highway under statutory powers to take proper precautions, by fencing or otherwise, to protect passengers from injury through their inadvertently continuing to use the former track (*Hurst* v. *Taylor*, 1885, 14 Q. B. D. 918).

Again, anyone who uses any part of a highway in an unusual and unreasonable manner, and thereby causes special damage to another, is liable to an action at the suit of that other. Thus, a man who left a steam plough or a roller or a heap of refuse on a strip of grass which was part of a highway, and thereby frightened the plaintiff's horse and caused him injury, was held liable in damages (*Harris* v. *Mobbs*, 1878, 3 Ex. D. 268; *Wilkins* v. *Day*, 1883, 12 Q. B. D. 110; *Brown* v. *Eastern and Midlands Ry. Co.*, 1889, 22 Q. B. D. 391). So was a man who repeatedly caused large crowds to assemble on a portion of a highway, and thus obstructed the access to adjoining premises (*Barber* v. *Penley*, [1893] 2 Ch. 447). So where a tramway company sprinkled salt on the snow (*Ogston* v. *Aberdeen District Tramways Co.*, [1897] App. Cas. 111). And if a water company under its statutory powers places in a highway an apparatus, which remains under its control, it is liable for injuries caused by neglect to keep it in repair (*Chapman* v. *Fylde Co.*, [1894] 2 Q. B. 599).

A private individual has a right of his own authority to abate a nuisance in a public highway, provided it does him a special injury; but he must only abate it as far as is necessary to enable him to exercise his right of passing along the highway (*Dimes* v. *Petley*, 1850, 15 Q. B. 276; 19 L. J. Q. B. 440; *Arnold* v. *Holbrook*, 1873, L. R. 8 Q. B. 96; *Denny* v. *Thwaites*, 1876, 2 Ex. D. 21). And see Nuisance.

A highway authority cannot be made liable in damages for a mere nonfeasance or omission to perform its duty. Thus it is the duty of the sanitary authority in London to keep the streets properly swept and cleansed (54 & 55 Vict. c. 76, s. 29); this involves the removal of snow; yet if the authority omit to sweep away the snow, a man who suffers special damage in consequence has no right of action (*Saunders* v. *Holborn District Board of Works*, [1895] 1 Q. B. 64). So, as we have seen (*ante*, p. 192), no action lies against a highway authority for merely neglecting to repair the way. But if the surveyor or other officer of a District or Borough Council has in the execution of his duties done any wrongful act, or committed any default other than passive neglect, the Council is liable in damages, *e.g.* if he uses steam rollers of such a weight as to break the water or gas mains lawfully laid under the road. But the action must be brought within three months after the act complained of, under sec. 109 of the Highway Act, 1835, and not within six months under

sec. 264 of the Public Health Act, 1875 (*Burton* v. *Corporation of Salford*, 1883, 11 Q. B. D. 286; *Graham* v. *Mayor, etc., of Newcastle-upon-Tyne*, [1893] 1 Q. B. 643).

Extraordinary Traffic.—It sometimes happens that a particular person uses the highway in an extraordinary manner or to an unusual degree; and though such uses may be not unlawful, nor a nuisance, still it may put an unfair strain on the metalling of the road and cause an undue amount of damage. It was felt that such a person ought to make a special contribution to the funds of the highway authority. Accordingly, by sec. 23 of the Highways and Locomotives (Amendment) Act, 1878, whenever damage has been caused to a highway "by excessive weight passing along the same, or extraordinary traffic thereon," the expense of repairing it can be recovered from the person who created the traffic. The phrase "extraordinary traffic" is discussed and explained in *Hill* v. *Thomas*, [1893] 2 Q. B. 333, and *Etherley Grange Coal Co.* v. *Auckland D. H. B.*, [1894] 1 Q. B. 37). The meaning of the phrase "excessive weight" is defined by Lord Esher, M. R., in *Kent County Council* v. *Vidler*, [1895] 1 Q. B. at p. 452; and see *Wirral Local Board* v. *Newell*, *ibid.* 827; *Kent County Council* v. *Lord Gerard*, [1897] App. Cas. 633; and TRACTION ENGINE.

X. HIGHWAY OFFENCES.

Misdemeanours.—It is a misdemeanour at common law, punishable on indictment or information with fine and imprisonment, for any man to obstruct a highway; for this is an injury to the community at large; it is, in fact, a common nuisance. Cutting a trench, or digging a ditch across a highway, ploughing it up, or erecting any fence or building, or placing any timber, stones, or other obstacle on any part of it, is an illegal obstruction to the passage of the public along the way. Everyone, in short, commits a common nuisance who does anything which renders the highway less commodious to the public than it would otherwise be; or who prevents them from having access to any part of it by an excessive and unreasonable, though temporary, use of it; or who so deals with the land in the immediate neighbourhood of the highway as to prevent the public from using and enjoying it securely. Thus it is a misdemeanour to saw timber or carry on any other trade in the street (*R.* v. *Jones*, 1812, 3 Camp. 230); to allow waggons to stand before a warehouse for an unreasonable time, as to occupy a great part of the street for several hours by day and night (*R.* v. *Russell*, 1805, 6 East, 427; 8 R. R. 506); to keep up a hoarding in front of a house in a street for the purpose of repairs for an unreasonable time (3 Camp. at p. 231); to dig up the roadway without statutory authority in order to lay down gas-pipes (*R.* v. *Stoke Fenton Gas Co.*, 1860, 29 L. J. M. C. 148); to excavate an area close to a footpath and leave it unfenced (*Barnes* v. *Ward*, 1850, 9 C. B. 392); and to blast stone in a quarry so as to throw stones upon the houses and road (*R.* v. *Mutters*, 1864, L. & C. 489; 34 L. J. M. C. 22; 10 Cox C. C. 6). And if a tramway be laid down on a highroad in such a manner as to obstruct the use of the road by common carriages, it is a public nuisance, although it may be a great convenience to many who go that way (*R.* v. *Train*, 1862, 2 B. & S. 640; 31 L. J. M. C. 169).

It is equally a misdemeanour to wilfully divert or obstruct the course of any navigable river so as appreciably to diminish its convenience for purposes of navigation, even though the alteration may, upon the whole, be for the convenience of the public (*R.* v. *Randall*, 1842, Car. & M. 496; *R.* v. *Russell*, 1854, 3 El. & Bl. 942; 23 L. J. M. C. 173). It will be otherwise if the obstruction be caused by a vessel which was sunk through an unavoidable

accident (*R.* v. *Watts*, 1798, 2 Esp. 675). But even in that case it is the duty of the owner, so long as he retains possession and control of it, to buoy his vessel or otherwise provide against other vessels striking on it (*White* v. *Crisp*, 1854, 10 Ex. Rep. 318).

It is a misdemeanour for any individual who is bound by law to repair a highway or bridge, to leave it unrepaired. Thus an indictment lies against anyone who is bound to repair a road *ratione tenuræ*, if he neglects his duty in this respect (*R.* v. *Barker*, 1890, 25 Q. B. D. 213). In former days the question of liability *ratione tenuræ* was generally raised and decided on an indictment; now it is more frequently settled by a proceeding under sec. 25 (2) of the L. G. Act, 1894. An indictment still lies against the inhabitants of a parish, if any highway in the parish which is repairable by the District or County Council be out of repair. But an indictment for non-repair of a highway will not lie against a Parish Council (*R.* v. *Shipley Parish Council*, 1897, 61 J. P. 488; 13 T. L. R. 486). It did not lie formerly against a surveyor of highways (*Young* v. *Davis*, 1863, 2 H. & C. 197), therefore it did not lie against a Highway Board to which the duties and liabilities of such a surveyor were transferred (*R.* v. *Mayor of Poole*, 1887, 19 Q. B. D. at p. 608; *Loughborough Highway Board* v. *Curzon*, 1886, 16 Q. B. D. at p. 570). But under sec. 10 of the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), an indictment apparently will lie against a District Council for non-repair of a highway (*R.* v. *Mayor, etc., of Wakefield*, 1888, 20 Q. B. D. 810).

The above misdemeanours are triable either at the assizes or at Quarter Sessions. The defendant is a competent witness, and may be compelled to give evidence for the prosecution (40 & 41 Vict. c. 14, s. 1). It will be a defence to an indictment against parishioners if they can show that a particular landowner is bound to repair that particular highway or portion of a highway, *ratione tenuræ* or *ratione clausuræ*, or that by custom a particular hundred or township in the parish is bound to repair it (*ante*, p. 190). But such a defence must be specially pleaded.

As to offences against bridges, see vol. ii. p. 247.

Offences Triable Summarily.—There are also many highway offences triable summarily before justices:—

Any person who works a steam engine or other machinery, or sinks a shaft, within 25 yards of the centre of a carriage-way, or erects a windmill within 50 yards of it, will be liable to be fined £5, unless sufficient screens are erected to prevent horses being frightened (Highway Act, 1835, s. 70).

So it is an offence, under sec. 72 of the Highway Act, 1835, for which every person offending may be fined 40s., over and above the damages which he occasions—

To wilfully ride upon any footpath or causeway by the side of any road made or set apart for the use or accommodation of foot passengers;

To wilfully lead or drive any horse, ass, sheep, mule, swine, or cattle, or carriage of any description, or any truck or sledge, upon any such footpath or causeway;

To tether any horse, ass, mule, swine, or cattle on any highway, so as to suffer or permit the tethered animal to be thereon (see the Highway Act, 1864 (27 & 28 Vict. c. 101), s. 25);

To cause any injury or damage to be done to any highway, or to the hedges, posts, rails, walls, or fences of any highway;

To wilfully obstruct the passage of any footway;

To wilfully destroy or injure the surface of any highway;

To wilfully or wantonly pull up, cut down, remove, or damage the posts, blocks, or stones fixed by the surveyor of the highway authority (see s. 24);

To dig or cut down the banks which are the securities and defence of any highway;

To break, damage, or throw down the stones, bricks, or wood fixed upon the parapets or battlements of bridges, or otherwise injure or deface the same;

To pull down, destroy, obliterate, or deface any milestone or post, graduated or direction post or stone, erected upon any highway;

To play at football or any other game on any part of a highway, to the annoyance of any passenger or passengers (see *Pappin* v. *Maynard*, 1863, 9 L. T. 327; 27 J. P. 745);

For any hawker, higgler, gypsy, or other person travelling, to pitch any tent, booth, stall, or stand, or to encamp upon any part of any highway;

To make or assist in making any fire, or wantonly fire off any gun or pistol, or set fire to or wantonly let off or throw any squib, rocket, serpent, or other firework whatsoever within 50 feet of the centre of any carriage-way or cartway;

To bait, or run for the purpose of baiting, any bull upon or near any highway;

To lay any timber, stone, hay, straw, dung, manure, lime, soil, ashes, rubbish, or other matter or thing whatsoever upon any highway, to the injury, interruption, or personal danger of any person travelling thereon;

To suffer any filth, dirt, lime, or other offensive matter or thing whatsoever to run or flow into or upon any highway from any house, building, erection, lands, or premises adjacent thereto;

To in any way wilfully obstruct the free passage of any such highway (see *Gully* v. *Smith*, 1883, 12 Q. B. D. 121).

The owner of any cart or waggon will be liable to a fine not exceeding 40s. if it has not his name and address painted on the offside in white letters not less than an inch high on a black background or in black letters on a white ground (s. 76).

Any person riding without reins or leaving a vehicle on the road, or keeping his wrong side and obstructing the free passage of others, or riding or driving furiously so as to endanger the life or limb of any passenger, is liable to a penalty (s. 78). A person riding a bicycle on a highway at such a pace as to be dangerous to passers-by may be convicted of furiously driving under this section (*Taylor* v. *Goodwin*, 1879, 4 Q. B. D. 228).

The owner of any horse, mare, gelding, bull, ox, cow, heifer, steer, calf, mule, ass, sheep, lamb, goat, kid, or swine found straying or lying about a highway, or the sides (except such parts of it as pass over common waste or unenclosed ground), is liable to a penalty not exceeding 5s. for every animal, up to 30s., recoverable summarily with the expenses of removal (Highway Act, 1864, s. 25; and see *Golding* v. *Stocking*, 1869, L. R. 4 Q. B. 516, and *Bothamley* v. *Danby*, 1871, 24 L. T. 656).

Any person who encroaches by making or causing to be made any building, or pit, or hedge, ditch, or other fence, or by placing any dung, compost, or other materials for dressing land, or any rubbish on the side or sides of any carriage-way or cartway, within 15 feet of the centre thereof, will be liable on conviction for every such offence to pay a fine not exceeding 40s., in addition to the costs of removing the obstruction (Highway Act, 1864, s. 51). Proceedings under this section must be taken within six months from the completion of the obstruction, otherwise the remedy will have to be by indictment.

Every person who rides a bicycle or tricycle more than an hour after sunset, without carrying a lighted lamp, is liable on summary conviction for

each and every such offence to a fine not exceeding 40s. (L. G. Act, 1888, s. 85). But though this Act expressly declares bicycles and tricycles to be "carriages" within the meaning of the Highway Acts, it contains no provision enabling a constable to arrest an offender without warrant; nor does it incorporate sec. 78 of the Highway Act, 1835. Hence there is no power to arrest a bicyclist who is travelling at night without a lighted lamp, and who refuses to stop when called on by a constable to stop (*Hatton* v. *Treeby*, [1897] 2 Q. B. 452; 66 L. J. Q. B. 729; 61 J. P. 586).

[*Authorities.*—Pratt on *Highways*, 14th ed.; Glen, *Law of Highways*, 2nd ed.]

Hilary—The name of one of the four yearly sittings of the Supreme Court of Judicature, as, prior to the abolition of terms by sec. 26 of the Judicature Act, 1873, it denoted one of the four terms of the legal year; the term being so called as it always began approximately near the festival of St. Hilary of Poictiers, which is observed on 13th January. Hilary sittings now commence each year on 11th January and terminate on the Wednesday before Easter (R. S. C. Order 63, r. 1). See TERMS.

In the Inns of Court, Hilary term is one of the four dining terms of the year; it begins on 11th January and ends on 1st February.

Hinde Palmer's Act.—The statute known by this name (32 & 33 Vict. c. 46) provides that in the administration of the estate of a person dying after 1869, none of his debts or liabilities shall be entitled to priority by reason merely that it is secured by or arises under a bond or deed, or is otherwise a specialty debt, but that all the creditors shall be treated as standing in equal degree. This is without prejudice to any security or lien a creditor may have. The statute does not take away the priority over other creditors of a judgment creditor who has obtained judgment against the executor before a decree is made for administration by the Court (*In re Stubbs' Estate*, 1878, 8 Ch. D. 154), nor the executor's right of retaining his own debt (*Wilson* v. *Coxwell*, 1883, 23 Ch. D. 764). It has not altered the right of retainer so as to enable the executor, where there are specialty debts unpaid, to retain the amount of a simple contract debt as against these (*loc. cit.*). In such a case the estate ought to be treated as appropriated rateably between the debts, in order to ascertain what the executor can retain (*In re Jones*, 1885, 31 Ch. D. 440).

Rent is a specialty debt within the statute, and therefore a landlord has no preferential claim against the estate of a deceased tenant as against the other creditors (*In re Hastings*, 1877, 6 Ch. D. 610).

Hindu Law.—The Portuguese who discovered the way to India used the term *Moros* or Moors to describe the Mohammedan feudatories and subjects of the Mogul; other races were included under the general name of *Gentoos*. Of the Gentoos the great majority were Hindus by religion, and their Mohammedan rulers permitted them to follow their own customs. At the present day a Hindu living in British India (*q.v.*) is for many purposes subject to Anglo-Indian law. If he commits a crime, he may be tried under the penal code; if he brings an action in our Courts, he must follow our rules of procedure. But the customs which regulate marriage, succession

to property, etc., are so intertwined with the religious beliefs of the people that the British authorities have not attempted to disturb them. Hindu law holds its ground as a personal law, forming part of the status of every family governed by it. The customs which form the basis of the law existed prior to and independent of Brahmanism; they have been modified by religious influences, especially in Bengal; and in modern times they have been to some extent affected by Western ideas. The customs of particular families and districts vary widely, and it is necessary to bear this in mind when the decisions of British Courts are referred to. A custom which is binding in one district, or among the members of one family, may be of no authority elsewhere.

The texts of Hindu law include the *Sruti* or revelation—the four Vedas, now seldom referred to; the *Smriti*, or Vedic literature, of which the so-called Laws of Manu may be taken as an example; and the *Commentators*. The most important commentary is the *Mitakshara*, which embodies the more primitive version of the customs relating to the joint family. In Western India the *Mayuka* is followed; in Bengal the *Daya Bhaga*, a commentary which tests legal acts by their religious efficacy, and favours several property. The existence of these separate schools makes it almost impossible to codify or harmonise the Hindu law; but the British Courts, though rightly conservative in their adherence to accepted texts and rules, have introduced an element of unity by endeavouring to make the customs, as far as possible, consistent with justice and sound policy. On some important points legislation has introduced general rules; see especially the Hindu Wills Act, 1870, the Minority Act IX. of 1875, and the Transfer of Property Act, 1882.

[*Authorities.*—The substance of the foregoing article is taken from Mr. J. D. Mayne's *Hindu Law and Usage*, 4th ed., 1888. See also the *Digests* of Colebrooke and of West and Bühler. Many important questions are discussed in the series of *Tagore Lectures*, published annually. For practical purposes the most important authorities are the Indian Law Reports (Calcutta, Madras, Bombay, and Allahabad Series) and the Indian Appeals begun by Moore and continued in connection with the English Law Reports. A complete list of the Indian Law Reports will be found under LAW REPORTS, *Indian*.]

Hinterland (German, literally Behindland) is the territory inland which forms a natural extension of the possessions on the coast. The term has come into use in connection with the occupation of the seaboard of Africa and the unexplored regions beyond the immediate coast-land occupied, the assumption being that the European Power which is settled on the seacoast has a preferential right to establish its authority more or less inland.

Though the term is of recent origin, the theory it involves is as old as the controversy on the western boundary of Louisiana between the United States and Spain (Twiss, *Peace*, p. 207). The former asserted as a principle that "when any European nation takes possession of any extent of seacoast, possession is understood as extending into the interior country to the sources of the rivers emptying within that coast, to all their branches and the country they cover, and to give it a right in exclusion of all other nations to the same, and thus, that by the discovery and possession of the Mississippi River in its whole length and the coast adjoining it, the United States were entitled to the whole country

dependent on that river, the waters which empty into it, and their several branches within the limits on that coast" (p. 209).

It has been generally admitted, said President Adams in a message to Congress dated December 28, 1827, that priority of discovery of the mouth of a river, followed within a reasonable time by an establishment thereat, gives the right of occupation, and extends the right of sovereignty to the country drained by such river and its affluents (Rivier, i. p. 196).

The question did not again arise till the scramble to possess or extend colonies in unsettled Africa brought the uncertainty as to what constitutes title by occupation in international law once more into the foreground.

To give greater precision to the principles of occupation was one of the objects of the Conference of Berlin. It drew up a general Act (Feb. 26, 1885) under which any Power thereafter taking possession of territory on the coast of Africa (apart from existing possessions) is bound to notify this fact to the other Powers, and to insure in such occupied territory "the existence of an authority sufficient to *faire respecter les droits acquis*" . . . The original wording of this article set up "*l'obligation d'établir et maintenir dans les territoires occupés une juridiction suffisante pour faire observer la paix, respecter les droits acquis*," etc. At the instance of the French ambassador the words "*assurer l'existence d'une autorité suffisante* were substituted for *établir et maintenir*, etc." (arts. 34 and 35). The chapter of the Act containing these two articles is entitled, "*Declaration relative aux conditions essentielles à remplir pour que des occupations nouvelles sur les côtes du continent africain soient considérées comme effectives.*" Importance is attached on the Continent to the use in the heading of the word "effective." As regards the import of title-heads in treaties, see TREATIES.

The object of these articles was to put an end to "paper occupations," if we may borrow from a well-known analogy. They do not, however, meet the difficulty of conflicting occupations or claims based on treaties with natives. Thus in recent negotiations between France and Germany for the delimitation of the boundaries of Dahomey and Togoland, it has been stated on German official authority that it was found impossible "to base claims on the mere fact that territory had been duly occupied by one or other of the negotiating Powers," since in point of fact such occupation had frequently been effected independently and even simultaneously (*Times*, October 21, 1897).

By the device of fixing the "spheres of influence" (*q.v.*) of contiguous settlements by different States, the possibility of dual occupations has been in several cases avoided, and the territory in question, in so far as affected, taken out of the operation of the General Act of Berlin.

Similarly the *Hinterland* theory has been resorted to as a device for preserving the necessary but indeterminate geographical extensions inland of coast settlements, prior to and therefore not affected by the General Act of Berlin, from its application.

Thus while the appropriation of Africa is, by agreement of European States, to be effected in accordance with the new principles of occupation, counter principles of "spheres of influence" and "Hinterland" have grown up to meet material difficulties on the one hand and protect vested interests on the other. (See OCCUPATION; SPHERE OF INFLUENCE; TREATIES.)

[*Authorities.*—Twiss, *Law of Nations in Time of Peace*, Oxford, 1884; Rivier, *Principes du Droit des Gens*, Paris, 1896; Salomon, *L'Occupation des Territoires sans Maître*, Paris, 1889; Heimburger, *Der Erwerb der Gebietsho-heit*, Karlsruhe, 1888; French Yellow Book on the Affairs of the Congo and of Western Africa, 1885.]

Hiring Agreement.

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A hiring agreement may, in general, be made verbally—subject in the case of land, tenements, etc., to secs. 1 and 4 of the Statute of Frauds—or in writing, or, indeed, in any way in which contracts can be made. It may have for its subject-matter services, or lands, or houses, or ships, etc. The law relating to several of these is treated under other headings, see especially MASTER AND SERVANT; LANDLORD AND TENANT; CHARTER-PARTY. In this place it is proposed to confine attention to the law relating to the hire of chattels, and in particular to that form of agreement known as a "hire-purchase agreement."

A hiring agreement relating to chattels is an arrangement (often embodied in a document) between two parties, the one the hirer, the other the owner (or lessor), whereby the owner agrees to lend and the hirer to hire certain chattels in return for a consideration, usually money, payable by instalments at fixed dates, the goods to be returned on demand or at a specified time. A hire-purchase agreement is a development of this. It usually provides that on the due payment of all the instalments the chattels shall become the property of the hirer and the agreement shall terminate, either by the mere payment of the instalments or on payment of a nominal sum; but that so long as any of the instalments remain unpaid, the chattels shall remain the property of the owner.

It is obvious that the delivery of goods under an agreement for hire constitutes a bailment (see *ante*, BAILMENTS, under which title some of the chief characteristics of the contract of hire are mentioned). In the absence of agreement to the contrary, it is the owner's duty to put the hirer in possession of the articles he agrees to let on hire, and to take care that they are fit for the purpose for which it is contemplated they will be used, that is to say, as fit as care and skill can make them (*Francis* v. *Cockrell*, 1870, L. R. 5 Q. B. at p. 503; *Hyman* v. *Nye*, 1881, 6 Q. B. D. 685), unless, indeed, the hirer prefers to rely on his own judgment in selecting the goods. But a lessor is not impliedly an insurer, and so if he take proper care, as just defined, is not liable in damages for supplying goods which are unfit on account of a latent, *i.e.* undiscoverable, defect (*Christie* v. *Griggs*, 1809, 2 Camp. 79; *Readhead* v. *Midland Rwy. Co.*, 1869, L. R. 4 Q. B. 379; and per Mathew, J., in *Hyman* v. *Nye*, *supra*). The responsibility just referred to is to the hirer; the lessor may also be responsible to third parties for damage caused by his failure to supply goods fit for the purpose intended, but if so the liability would not arise *ex contractu*, but from negligence (see, *e.g.*, *Heaven* v. *Pender*, 1883, 11 Q. B. D. 503; and see under NEGLIGENCE). The lessor is bound to allow the hirer to have possession of the goods during the whole time agreed, save that if the hirer does anything inconsistent with a continued recognition of the lessor's ownership, the lessor may at once demand the return of the goods, and sue for conversion if they be not handed over to him (*Fenn* v. *Bittlestone*, 1851, 21 L. J. Ex. 41; *Farrant* v. *Thompson*, 1822, 5 Barn. & Ald. 826; *Cooper* v. *Willomatt*, 1845, 14 L. J. C. P. 219).

The hirer is bound to take reasonable care of the goods, not the most

exact care, as stated in *Coggs* v. *Bernard*, 1702, Raym. (Ld.) 909, but such care as an ordinarily careful man would take of goods of the class hired (Jones, *Bailments*, 86; Beven on *Negligence*, 956); the same care would not be required of a market gardener's cart as of a brougham; each case must depend on its own circumstances, the question whether the hirer has fulfilled his implied undertaking to exercise care being one entirely of fact (*Searle* v. *Laverick*, 1874, L. R. 9 Q. B. 122; *Deane* v. *Keate*, 1811, 3 Camp. 4). If the hirer returns the goods in a damaged condition, the burden of proving that the damage was caused by circumstances for which he is not responsible may be on him, or it may be for the lender to make out a *primâ facie* case of negligence against the hirer; if the damage is such that in ordinary course it does not happen to a thing of the nature hired if used with proper care, the burden of showing that he is not to blame is on the hirer; *aliter*, the complaining lessor must make out a *primâ facie* case (*Cooper* v. *Barton*, 1810, 3 Camp. 5 *n*). A hirer is under ordinary circumstances not liable, in the absence of special agreement, for damage caused to an article by fair wear and tear (Hale, C.J., in *Pomfret* v. *Ricroft*, 1 Wms. Saun. 321, 323 (*b*)). The hirer may not use the goods for a purpose other than that for which they were hired (*Burnard* v. *Haggis*, 1863, 32 L. J. C. P. 189); and if in the course of such wrongful user they are damaged he will be liable to the lessor, even if the damage might have happened to them though they were used according to the contract (per Tindal, C.J., in *Davis* v. *Garrett*, 1830, 6 Bing. at p. 724). It has been decided that the hirer of a chattel is responsible for the damage caused by the want of reasonable care of a person whom he allows to use the chattel, even though that person is not at the time acting as servant to the hirer (*Coupé Co.* v. *Maddick*, [1891] 2 Q. B. 413); and assuming that the delegation of the use is unauthorised expressly or by implication, the decision is unquestionable; but if the use of the third person was of a nature within the contemplation of the parties to the hiring, there are reasons for questioning the correctness of the judgment in this case (see Beven on *Negligence*, 964, 965). The hirer is responsible to the lessor for the negligence of his servant as for other torts and breaches of contract. See MASTER AND SERVANT.

The hirer is entitled to enjoy the use of the chattels during the specified time, but he cannot enforce this right against one who has a right to the chattels paramount to that of the lessor, as a bailee cannot be in a better position than his bailor (*Wilson* v. *Anderton*, 1830, 1 Barn. & Adol. 450). He has a right to proceed against a person wrongfully taking the goods during the period of hiring, the proper action being one of conversion against any but the lessor, and against him an action on the contract. Whether he has a right of action for damage wrongfully or negligently done to the goods by a person other than the lessor during the period of the hiring depends upon whether he himself suffers any damage or not by the wrongful act or negligence; in particular, he may sue the third person and recover damages, if he is himself liable over to his lessor for the damage done (*Claridge* v. *South Staffordshire Tramway Co.*, [1892] 1 Q. B. 422).

At the end of the period for which the goods are hired he must return them to the lessor in proper condition, and he cannot justify his refusal to give them up by setting up a *jus tertii* (*Barker* v. *Furlong*, [1891] 2 Ch. 172), at anyrate unless he refuses delivery under the authority of and defends the action for the third person (*Rogers* v. *Lambert*, 1890, 24 Q. B. D 573, following *Biddle* v. *Bond*, 1866, 6 B. & S. 225). To this there is an exception, for the hirer is not responsible for failure to redeliver where he is unable to make it through no fault of his own, *e.g.* if the goods are seized and

are in the custody of the law (*Verrall* v. *Robinson*, 1835, 2 C. M. & R. 495), or if the goods are destroyed under circumstances which throw no liability either in contract or in tort on the hirer (*Taylor* v. *Caldwell*, 1863, 32 L. J. Q. B. 164). And he is not responsible if he has been evicted by title paramount, unless, indeed, he took the goods with notice that he was liable to such eviction (*Ex parte Davis*, 1882, 19 Ch. D. 86).

The lessor may not, during the hiring, bring an action against a third party who converts the goods, for he has no possession. But if the hiring is put an end to by the conversion, *e.g.* if the hirer is a party to it, or if otherwise the lessor is entitled to resume possession, then the lessor may bring the action (*Gordon* v. *Harper*, 1796, 7 T. R. 9; *Nicolls* v. *Bastard*, 1835, 2 C. M. & R. at p. 660; *Bryant* v. *Wardell*, 1842, 2 Ex. Rep. 479, 482). The lessor's right to bring an action for negligence causing damage to the goods during the continuance of the hiring depends upon whether the injury to the goods is such as to cause damage to his reversionary interest, as would happen if permanent injury is done to them (*Mears* v. *London and South-Western Rwy. Co.*, 1862, 31 L. J. C. P. 220, with which compare *Tancred* v. *Allgood*, 1860, 28 L. J. Ex. 362).

The lessor's right to sue a third party for conversion of goods which that party takes under a disposition from the hirer, does not exist where a chattel is let to one who affixes it to his land in such a way as to make it a fixture, and afterwards sells or mortgages his land to another who has no notice of the lessor's rights to the chattel; and the fact that the chattel is a trade fixture, and that the lessor of the chattel has reserved to him by agreement with the hirer the right in certain circumstances to retake possession of the chattel—as is frequently provided in hire-purchase agreements—will not suffice to oust the purchaser of the land without notice of these facts (*Hobson* v. *Gorringe*, [1897] 1 Ch. 182); *aliter*, if the chattels be seized by the lessor and removed before the mortgagee goes into possession, and the facts are such as to warrant the conclusion that the mortgagee authorised the mortgagor to hire and bring on to the land fixtures necessary to conduct the business (*Gough* v. *Wood*, [1894] 1 Q. B. 713). See under FIXTURES; MORTGAGE.

A hiring agreement is assignable, and though accompanied by a licence to retake the chattels comprised therein is not a bill of sale even within the extended meaning of that term given by the Bills of Sale Acts (*In re Davis*, 1888, 22 Q. B. D. 193); the licence to seize (if any) is unassignable (*Brown* v. *Metropolitan Counties Life Insurance Co.*, 1860, 28 L. J. Q. B. 236). The instalments, both those in arrear and those payable in the future, may also be assigned, and such assignment is good against the assignor's trustee in bankruptcy; and the assignee is entitled to instalments becoming payable after the commencement of the bankruptcy, provided that they were due at the date of the assignment and payable unconditionally (see and contrast *In re Davis* (*supra*); *Ex parte Nicholls*, 1883, 22 Ch. D. 782; *Wilmot* v. *Alton*, [1897] 1 Q. B. 17).

Hire-Purchase and Bills of Sale Acts.—A hire-purchase agreement, if it be what it professes to be, is not a document within the Bills of Sale Acts, and therefore need not be registered or otherwise made to satisfy the requisitions of those Acts. And the reason is this, that the agreement is not a document on which the title of the owner (*i.e.* the lessor) of the chattels depends; the chattels must (in ordinary course) have been his before the agreement was executed (*Ex parte Crawcour, In re Robertson*, 1878, 9 Ch. D. 419). Neither is the hire-purchase agreement a licence to seize chattels as security for a debt. Even in that class of case which arises when one sells his goods to another and the latter lets the goods to the former owner on a hire-

purchase agreement, the hire-purchase agreement is not a bill of sale, and assuming that the sale which precedes the hiring is carried out without the execution of a document falling within the Bills of Sale Acts, nothing need be registered (*Ex parte Crawcour* (*supra*); *Crawcour* v. *Salter*, 1881, 18 Ch. D. 30). It will frequently happen that a person in want of money will sell his furniture or other goods and enter into a hire-purchase arrangement with the vendor, both parties thus obtaining an advantage not dissimilar to that to be obtained by a bill of sale transaction without the disadvantages inseparable from the latter. And if the parties can manage thus to evade the Bills of Sale Acts, they may do so (see, *e.g.*, *United Forty Pound Loan Co.* v. *Bexton*, [1891] 1 Q. B. 28 *n*). But the Court looks upon such a transaction with suspicion, and will not be tied down by the form of any document from looking to the real nature of the transaction it professes to embody (*In re Watson*, 1890, 25 Q. B. D. 27). Where the documents state the true transaction, the questions for consideration seem to be these: (1) From the terms used and from the surrounding circumstances, is it a fair inference that the parties intended a sale or a hire arrangement? and if a sale, (2) was it the intention of the parties that the property in the goods should pass to the purchaser, or was it intended that he should have possession merely? (see Sale of Goods Act, 1893, s. 17); if the document was one embodying a contract of sale, and if under its terms the property in the goods passed to the buyer, then the right to retake the goods on default of payment of purchase money will generally bring the transaction within the Bills of Sale Acts, otherwise it will not (*McEntire* v. *Crossley*, [1893] App. Cas. 457). (Such a transaction must be carefully distinguished from a sale with a right to repurchase by instalments; such a transaction may also be outside the Bills of Sale Acts under certain circumstances.) If the document does not state the true transaction, and the Court is satisfied that that which is on the surface a hire-purchase agreement is in reality a loan on the security of chattels, the document—notwithstanding its form—will be treated as within the Bills of Sale Act, 1882, and may be avoided for non-compliance with that Act (*In re Watson*, 1890, 25 Q. B. D. 27), the grantor (*Madell* v. *Thomas*, [1891] 1 Q. B. 230) being entitled to take advantage of the defect as well as his creditors and their representatives, and whether the transaction be carried out in one or more documents (*Ex parte Odell*, 1878, 10 Ch. D. 76), and whether these be or be not under seal (*Madell* v. *Thomas*, *supra*). The question is one entirely of fact (Esher, M. R., in *In re Watson*, *supra*), and therefore no rules for guidance can be laid down of any real value. In one case (*Yorkshire Railway Wagon Co.* v. *Maclure*, 1881–82, 19 Ch. D. 478; 21 Ch. D. 309) Kay, J., said, "It is a question not of law, but of common sense, whether the transaction was a borrowing or not," and he held "unhesitatingly" that it was a case of borrowing and not a hiring. In the Court of Appeal, Jessel, M. R., "never saw a stronger or clearer case" for exactly the opposite view. The difficulties are well exemplified in the cases which will be found quoted and criticised by Cave, J., in *Becket* v. *Tower Assets Co.*, [1891] 1 Q. B. 1, reversed on the facts, but not otherwise, [1891] 1 Q. B. 638. Sometimes the statements of the parties will show that the apparent sale followed by a hiring agreement was a sham, as in *In re Watson* (*supra*), where the apparent lender was held to be a mortgagee; in *Manchester, Sheffield, and Lincolnshire Rwy. Co.* v. *North Central Wagon Co.*, 1888, 13 App. Cas. 544, the verbal evidence tended to show that the transaction was a mortgage, but the Court concluded that the document was not intended to be such, and supported its validity though it was unregistered. If the so-called lessor or lender when he parts with the possession of the

goods bargains that he shall have a "lien" or "charge" on them till a price is paid, this will be evidence that he has disposed of the property in them, that his reserved right to retake them is a licence to take possession of goods on security for debt, and that the document is within the Bills of Sale Acts (*In re Coburn*, 1887, 35 Ch. D. 373). On the other hand, the reservation of the lender's right to resume possession of the things lent, and to sell without accounting to the borrower for the price received, has weighed in bringing the Court to decide that the document is a hiring agreement (*Manchester, Sheffield, and Lincolnshire Rwy. Co.* v. *North Central Wagon Co.*, 1888, 13 App. Cas. 544).

An authority to the lessor to seize and sell chattels he has recently bought from and let to the hirer on default of payment of instalments, coupled with an undertaking to pay the hirer any money obtained at such second sale in excess of that originally given to the hirer for the goods, is strong evidence to show that the sale and hire-purchase agreement is but a cloak for a bill of sale transaction (*Ex parte Odell, supra*).

The clause, now common form in a hiring agreement, that the goods are to remain the property of the lessor until the instalments have all been paid, is some evidence that the agreement is one of hire; its absence would be some evidence towards a contrary conclusion.

The assignment by the lessor of a hiring agreement to a third party, though it contains a right to seize the goods on the hirer's default, is not a bill of sale, and on this ground, that the right to seize, being unassignable, would not pass to the third party (*In re Davis, Ex parte Rawlings*, 1883, 22 Q. B. D. 193).

The Reputed Ownership Clause and Hiring Agreements.—By the Bankruptcy Act, 1883, sec. 44, subsec. 2 (iii.), the trustee in bankruptcy is entitled to such goods as are at the commencement of the bankruptcy (*i.e.* the date of the earliest act of bankruptcy on which the petition could have been founded) in the possession, order, or disposition of the bankrupt by the consent and permission of the true owner, under such circumstances that he *is the reputed owner* of them; provided that they are with the bankrupt in his trade or business, a proviso to be remembered when consulting the cases under the repealed Bankruptcy Acts. This section may, if the hirer becomes bankrupt before he has paid the instalments which would vest the property in him, enable the trustee to defeat the claim of the lessor to a return of the hired property. The point to be determined is this: is the bankrupt with the hirer's assent holding the goods as reputed owner? This reputation of ownership may be rebutted by custom if the custom has been sufficiently long established that it presumably is known not only to the particular trade it relates to, but also to all persons as a class who would in ordinary course have been likely to be creditors of the bankrupt (per Mellish, L.J., in *In re Hill*, 1875, 1 Ch. D. 504*n*, in which case he decided that the custom of hiring carriages from a carriage builder would not exclude in the lessor's favour the doctrine of reputed ownership). Whether there is or is not a custom to take goods on hire sufficiently notorious to rebut the reputation of the hirer's ownership is a question of fact to be proved by evidence (*Ex parte Brooks, In re Fowler*, 1883, 23 Ch. D. 261), though when a custom has been proved often enough the Court will in cases of a similar character take judicial notice of the custom (Court of Appeal in *Ex parte Powell, In re Matthews*, 1875, 1 Ch. D. 501). In this last-mentioned case the Court held with some difficulty that in the absence of evidence to the contrary the affidavits of furniture dealers that it was customary for hotel-keepers to hire furniture would take the furniture of the hotel-keeper out of the reputed

ownership clause, and therefore the order went from the lessor as against the hirer's trustee in bankruptcy. By the time that *Crawcour* v. *Salter*, 1881, 18 Ch. D. 30, was decided, the Court was satisfied, without evidence, that "no person dealing with a hotel-keeper ought to assume that the furniture belongs to him," a view subsequently followed in *Ex parte Turquand, In re Parker*, 1885, 14 Q. B. D. 636. So it has been decided that the custom to take pianos on the hire-purchase system is sufficiently notorious to protect the lessor as against the trustee in bankruptcy of the hirer (*In re Blanchard, Ex parte Hattersley*, 1878, 8 Ch. D. 601); and that in the printing trade the reputation of ownership does not arise as regards the printing machinery, though it does (unless rebutted by evidence) as regards the type (*In re Thackral*, 1888, 5 Morr. 235). It is now notorious that a boarding house keeper hires furniture, hence on his bankruptcy the reputed ownership clause does not defeat the lessor (*In re Chapman*, 1894, 1 Manson, 415; as regards a lodging house keeper, see *In re Harrison*, 1892, 10 Morr. 1). It has been urged in some cases that the habit of furniture dealers of letting out furniture on hire is so well known that there is no reputation that any man is owner of furniture in his own house, and *Ex parte Emmerson, In re Hawkins*, 1871, 41 L. J. B. 20, lends some colour to the argument. But this is not so, and *Ex parte Brooks, In re Fowler*, 1883, 23 Ch. D. 261, is an authority for saying that the habit of hiring furniture from dealers for private houses was not in 1883—and, *semble*, is not—so general as to be a custom sufficient to rebut the presumption that a man is owner of the furniture in his house, or—what is more important in view of the wording of the present Bankruptcy Act—in his business premises; see also *Ex parte Lovering, In re Jones*, 1874, L. R. 9 Ch. 621, to the same effect. It may be suggested that the facts of *Ex parte Emmerson* (*supra*), which differed in one important respect from those of *Ex parte Brooks*, account for the different results of the two cases; for whereas in *Ex parte Emmerson* the goods which were hired were originally the property of the debtor, and had been sold to the lessor, in *Ex parte Brooks* this was not the case. It is submitted, however, that this is not of itself sufficient to account for the difference of result, and that *Ex parte Emmerson* will not in future be followed.

Hire-Purchase Agreements and the Factors Act, 1889.—The ninth section of the Factors Act provides that a person in possession of goods, or documents of title to them, may dispose of them and give a good title as if he were a mercantile agent in possession of the goods with the consent of the true owner, provided that he has bought or *agreed to buy* the goods. The question has arisen whether when under a hire-purchase agreement the hirer is in possession of the goods and disposes of them to a *bonâ fide* disposee for value he can give the latter a good title. The answer depends on the form of the agreement; if the wording be such as to amount to a contract of sale binding both parties, the one to buy and the other to sell, the Factors Act applies, and the lessor is defeated (*Lee* v. *Butler*, [1893] 1 Q. B. 318); but if the hirer has but an option to buy, the lessor can defeat the third party (*Helby* v. *Matthews*, [1895] App. Cas. 471, in which case the agreement provided that "the hirer may terminate the agreement by delivering up to the owner" the chattel hired). Under the Larceny Act (24 & 25 Vict. c. 96, ss. 3 and 100) the owner of goods stolen by a bailee may get a restitution order if he prosecutes the thief to conviction, and under the Sale of Goods Act, 1893, s. 24, the goods on conviction of the thief "revest" in the owner; but it has been decided that neither of these Acts interferes with the rights of one who has obtained goods *bonâ fide* and for value from the thief who has

"agreed to buy"; hence the hirer under a hire-purchase agreement in the form of that in *Helby* v. *Matthews* (*supra*) gives an indefeasible title to a *bonâ fide* purchaser without notice (*Payne* v. *Wilson*, [1895] 1 Q. B. 653).

[*Authorities.*—Story on *Bailments*; Jones on *Bailments*; Beven on *Negligence*, 2nd ed.]

Holding Over.—See DOUBLE RENT AND DOUBLE VALUE.

Holidays.—As to the effect of holidays on the computation of time, see BANK HOLIDAY; BUSINESS DAY; CHRISTMAS DAY, and similar headings. See also TIME, *Computation of*.

Holidays excepted.—See DEMURRAGE.

Holy Orders.—Those members of the Church who are by their ordination distinguished from the laity possess holy orders. Ordination consists in the laying on of hands by the bishop with a proper form of prayer.

The preface to the ordinal in the Book of Common Prayer states that from the apostles' time there have been in the Church of Christ three orders of ministers in the Church,—bishops, priests, and deacons; and it provides that no man shall be accounted for a lawful bishop, priest, or deacon in the Church of England except he be called, tried, and admitted thereunto according to the form thereafter following, or hath had formerly episcopal consecration or ordination. The form of conferring holy orders so referred to received the force of law under 6 Edw. VI. c. 1; and although the Act was repealed by Mary, it was used after the accession of Elizabeth; it is recognised by Article 36, and Canon 8 of 1603. In 1662 it was slightly altered, and from that time has continued as the proper mode of conferring orders in the Church of England. It is bound up with the Prayer-Book, and by sec. 16 of the Act of Uniformity, 1662, 14 Car. II. c. 4, all subscriptions to the Thirty-nine Articles shall be construed to extend to it.

The Church of England recognises the orders of the Church of Rome and of the Greek Church as valid, but not the ordinations of ministers of non-episcopal bodies, whether native or foreign.

Holy orders are in their nature indelible, and the Church therefore before admitting to such requires what is technically called a title (*titulus*) as a guarantee that the person to be admitted is able to support himself. In the Church of England this matter is now regulated by Canon 33 of the Canons of 1603. The qualifications required are that the person desiring to be ordained (1) shall exhibit to the bishop a presentation of himself to some preferment then void in the diocese, (2) bring a certificate that he is provided of some church in the diocese, or (3) of some minister's place in the cathedral church or some collegiate church in the diocese, (4) is a fellow or in right as a fellow, (5) is a conduct or chaplain in some college in Cambridge or Oxford, (6) is a master of arts of five years' standing that liveth of his own charge in either of the universities, or (7) is shortly to be admitted by the ordaining bishop to some benefice or curacy already void. If the bishop ordain a person without any of such titles he shall maintain him

until he shall prefer him to some ecclesiastical living, which if he fail to do he shall be suspended from giving orders for the space of a year.

No bishop can be obliged to confer holy orders, having in this matter an unfettered discretion (see further, articles DIMISSORY LETTERS; ORDINATION; TITLE; INCUMBENT).

A clergyman may by canon law be deposed or degraded from holy orders. This must not be understood to mean that he is thereby deprived of his sacerdotal character; but that he loses all the advantages of the clerical estate (*ordine beneficio et privilegio clericali*), and may be dealt with by the civil power, as if he were a mere layman.

This degradation may be of two kinds—by word of mouth, or solemnly, by divesting him of the orders or ensigns of his order or degree. If the person to be degraded is in inferior orders, the degradation may be effected by the bishop of the diocese; if in superior orders, by the bishop of the diocese accompanied by certain other bishops. (As to the form of degradation, see Phillimore, *Eccl. Law*, vol. ii., 2nd ed., p. 1086; Gibs. *Codex*, p. 1066; and 6 Blunt, 1, 5, f. 9, c. 2, there cited.) Sec. 8 of the Clergy Discipline Act, 1892 (55 & 56 Vict. c. 32), provides that where under that Act or any sentence thereunder the preferment of any clergyman becomes vacant, the bishop may, if he thinks proper, by sentence and without any further formality, depose such clergyman from holy orders, and the sentence may be recorded in the register of the diocese; but such clergyman may appeal within one month to the archbishop of the province, whose sentence is final. Where under this Act a clergyman is deprived of his preferment by sentence of the Consistory Court, and it appears to the bishop that he ought also to be deposed from holy orders, the sentence of deposition need not be delivered concurrently with that of deprivation, but may be passed at a subsequent time (*R.* v. *Bishop of Durham, Ex parte Evans*, [1897] 2 Q. B. 414). (*Note.*—This case is at present under appeal.)

The relinquishment of the profession of holy orders is forbidden by Canon 76 of the Canons of 1603 under pain of excommunication (*q.v.*), but the effect of this canon is modified by the Clerical Disabilities Act, 1870 (33 & 34 Vict. c. 91), which enables a clergyman who has resigned every preferment held by him to execute and enrol a deed relinquishing all rights, privileges, advantages, and exemptions pertaining to the clerical office. (As to this Act further, see article CLERGY.)

Canon law draws a distinction between the *ordines, sacri*, or *majores*, bishop, priests, and deacon, and the inferior orders (*ordines minores*), subdeacon, acolyte, exorcist, reader, and ostiary; but these latter are not at present recognised as distinct orders in the Church of England.

As to the right of clergy in Scotch episcopal, or colonial orders to hold benefices in the Church of England, see articles CHURCH OF ENGLAND; INCUMBENT.

Article 25 states that holy orders are not to be counted for a sacrament of the Gospel.

As to the necessity of holy orders for the holding of an ecclesiastical preferment, see INCUMBENT.

[*Authorities.*—Gibs. *Codex*; Phillimore, *Eccl. Law*, 2nd ed.: Blunt on the *Book of Common Prayer*.]

Homage.—This word is used in English law in the following connections:—(1) Of the oath of fealty to the sovereign taken by the nobility

at a coronation; (2) of the oath of fealty taken by a newly appointed archbishop or bishop (see also BISHOP, and for both (1) and (2) OATH OF ALLEGIANCE); (3) of the oath of fealty to the superior lord formerly taken by every tenant by knight service, saving his allegiance to the king, but not usually required of socage tenants, and in all cases abolished by Statute 12 Car. II. c. 24, 1660; (4) to denote the body of freeholders present at a Court baron, or of copyholders present at a manorial Court (see COPYHOLD). The term is derived from *homo*, and indicates the declaration contained in the oath that he who takes it becomes the "man" of the sovereign or other superior. See vol. ii. p. 156.

Home Office.—The Home Secretary is the first in precedence of Her Majesty's principal Secretaries of State (see SECRETARY OF STATE), and discharges all the duties of that office for which no separate secretaries have been appointed. His constitutional position as a Cabinet Minister has been dealt with under CABINET, and as minister of the Crown under EXECUTIVE GOVERNMENT. He is the ordinary adviser of the Crown in the exercise of its authority, both prerogative and statutory, in internal matters, and has further statutory duties conferred upon him individually. His functions are now largely restricted to England and Wales. Though he is the channel of communication between the Crown and the Lord-Lieutenant of Ireland, the functions of Home Secretary are discharged in Ireland by the Chief Secretary to the Lord-Lieutenant, a parliamentary, and in recent years, a Cabinet, Minister. Since 1884 the duties exercised by the Home Secretary in regard to Scotland have been transferred to a Secretary for Scotland, who does not enjoy the rank or emoluments of a Secretary of State, and is not always a Cabinet Minister.

The original function of the Secretary of State was to convey the royal pleasure, and act as the channel of communication between the Crown and the subject. Addresses and petitions to the sovereign in person pass through the hands of the Home Secretary, and matters of State intelligence are notified by him to the public. He countersigns and is responsible for the greater number of instruments under the sign-manual of the sovereign, by which the royal authority is exercised. He also carries on communications between the Crown and the Channel Islands and the Isle of Man, and conveys the royal pleasure in certain Church matters, such as the appointment to Crown livings, the summoning of convocation, etc.

When redress is sought from the Crown by petition of right, it is the Home Secretary's duty to advise the sovereign whether the necessary fiat should be granted to allow it to proceed. No action will lie against him for advising a refusal of the fiat (*Irwin* v. *Grey*, 1865, 3 F. & F. 365); but it is usual to refer the petition to the Attorney-General, whose constitutional duty it is not to advise a refusal of the fiat unless the claim is frivolous (Bowen, L.J., *In re Nathan*, 1889, 12 Q. B. D. 479).

One of the most important of the Home Secretary's duties is to advise the Crown in the exercise of the prerogative of pardon (*q.v.*). In the absence of a Court of Criminal Appeal, the functions of such a body are largely thrown upon the Home Secretary. He advises the Crown whether persons under sentence of death should be reprieved or the law allowed to take its course; though he has no power to reverse a conviction, he may, if satisfied that there has been a miscarriage of justice, remit its penal consequences by advising the grant of a pardon. He may also advise the remission of a part of the sentence, and grant licences to prisoners allowing

them to be at large during good behaviour. In the exercise of these powers it is customary for the Home Secretary in each case to consult the judge who presided at the trial.

The duty of maintaining the peace and suppressing disorder is primarily thrown on the local authorities, but the Home Secretary would appear to be bound to direct and supplement their efforts, when necessary, throughout the kingdom. He is said to have authority at common law to commit for treason, and as a Privy Councillor is in the commission of the peace for every county. The Commissioner of Metropolitan Police is nominated by him, and bound to obey his orders; and he has a large measure of indirect control over the county and borough police, as his recommendation is necessary for the payment of the Imperial grant in support of those forces, and for other purposes connected with them. He is further empowered to authorise the appointment of special constables, and to call out the army reserve and the militia for the suppression of riots. In furtherance of his duties in maintaining internal order, he is also empowered to open letters and telegrams in the post office, and has the administration of part of the secret service money.

The functions of the Home Secretary in regard to the administration of justice are very numerous. He advises the Crown as to the time of holding assizes, or the issue of a special commission for the trial of great offenders; as to the grant of a separate Court of Quarter Sessions to a borough. He nominates the recorders, as the judges of such Courts are styled, and also appoints the metropolitan police magistrates, and regulates the business of their Courts, appoints stipendiary magistrates in boroughs, and exercises various minor powers. Since 1877 the prisons are vested in him and subject to his control, and he also administers the Acts for establishing Reformatory Schools for the detention of juvenile offenders, and Industrial Schools for children not under due control. Under the Criminal Lunatics Acts, the Home Secretary has power to order persons detained in prison on a criminal charge and certified to be insane to be removed, even, it would appear, before trial, to a criminal lunatic asylum, and he has similar powers with regard to persons found guilty but insane at the time of committing the act, and ordered to be detained during Her Majesty's pleasure (see ASYLUMS, vol. i. p. 393).

Further, the Home Secretary administers the Extradition Acts, 1870 and 1873, and the corresponding Fugitive Offenders Act as regards offences committed in the Queen's dominions. He also administers the Naturalisation Acts, and it is in his discretion whether he will grant a certificate of naturalisation or not to aliens who have complied with the statutory conditions.

The by-laws of municipal corporations must be submitted to the Home Secretary, who may recommend the Crown to disallow them by Order in Council. The Home Office also watches the progress of private bills through Parliament, and directs attention to all provisions which affect the criminal law.

Parliament has intrusted the Home Secretary with the administration of a large number of statutes directed to secure the general well-being of the community. To enumerate all these Acts and the powers they confer upon the Home Secretary is impracticable, but the following subjects may be mentioned in addition to those already dealt with:—EMPLOYERS' LIABILITY, BUILDING SOCIETIES, BURIALS, COAL MINES, EXPLOSIVES, FACTORIES AND WORKSHOPS, and MARKETS AND FAIRS. For his statutory powers, see Index to the Statutes, under SECRETARY OF STATE; and for a fuller account of the office, Anson, *Law and Custom of the Constitution*, vol. ii. pp. 227, etc.

Homicide is the killing of man by man, or through agencies or instruments, animate or inanimate, put into action by man.

This may occur under circumstances creating (1) criminal liability, (2) civil liability, (3) no legal liability whatever.

Criminal Liability.—The English law does not, like some other systems, classify homicides by specified degrees of culpability (see Ind. Penal Code, ss. 299–309).

But where the slaying is deliberate and unjustifiable or inexcusable by law, it is punishable as high treason or as felony according to the status of the person killed. See DUEL; MURDER; TREASON.

Where it is legally culpable but not deliberate, it is punishable as manslaughter (Steph. *Dig. Crim. Law*, 5th ed., 181). See CHANCE MEDLEY; DUEL; MANSLAUGHTER. How far provocation may extenuate homicide is considered under those heads. Where a sane man kills himself, he commits the offence of *felo de se*. See SUICIDE.

Civil Liability.—Until 1846, where a man was killed by the act or default of another which would have entitled the deceased if he had been injured only and not killed to sue for damages, personal representatives and the wife and relatives of the deceased had no legal remedy under English law, the cause of action being regarded as personal and subject to the maxim *actio personalis moritur cum personâ* (*q.v.*). Scots law was different, providing a means of compensation under the name of assythment; and in Anglo-Saxon and early English law a rude form of compensation was provided by the blood wite.

By the Fatal Accident Acts, 1846, commonly called Lord Campbell's Act, 9 & 10 Vict. c. 95, amended by 27 & 28 Vict. c. 95, a right of action was given against a person who, by his wrongful act, neglect, or default, caused the death of another. This right attaches to cases under the Employers' Liability Act, 1880, and the Compensation for Accidents Act, 1897. The action is brought by the executor or administrator of the deceased on behalf of the lawful parents, spouse, or children of the deceased within twelve months of the death (ss. 2, 3).

It is immaterial whether the wrongful act was criminally punishable or not; and the questions to be considered are (1) whether the act if the deceased had survived would have given him a cause of action; (2) what loss or expense has been caused to the surviving relatives by the death. The whole subject, including all the case law up to 1894, is fully treated by Mr. Beven (*Negligence*, 2nd ed., 215–251). Claims by the representatives of several persons killed by the same wrongful acts can now, if convenience permits, be joined in a single action (R. S. C. of 26th October 1896, Order 16, r. 1, and County Court Rules of 19th November 1896, Order 3, r. 1). These rules get rid of the decisions in *Hannay* v. *Smurthwaite*, [1894] App. Cas. 494, and *Carter* v. *Rigby*, [1896] 2 Q. B. 113, decided on the previous rules of procedure.

No Legal Liability.—There are many instances in which homicide, while, as already said, *primâ facie* it amounts to a crime, entails no legal liability. The general grounds for rebutting the presumptions common to all crimes have already been indicated under GENERAL EXCEPTIONS and GUILTY MIND. But it may be profitable to recapitulate the special particular references to homicide, and to add the particular defences only applying in such cases—

(*a*) No criminal liability attaches where the death happens more than a year and a day after the act or omission which led to it (Steph. *Dig. Crim. Law*, 5th ed., p. 180). This is a rough and ready way of settling the

question of cause and effect. It does not apply to civil liability, except that if the deceased sued in his lifetime his relatives cannot sue under Lord Campbell's Act, 1846.

(*b*) No criminal liability attaches if the slayer was not of sufficient mental capacity to commit crime, *i.e.* was an idiot or lunatic, or a child under seven years. The liability of children between seven and fourteen depends on whether the child has or has not attained sufficient maturity of understanding to judge the nature and consequences of his act, and the old maxim, *malitia supplet ætatem*, is in certain cases then applied (cp. Ind. Penal Code, ss. 82, 83, 84). See INFANTS; IDIOT; LUNACY; DRUNKENNESS.

The civil liability of an idiot or lunatic for homicide is not ascertained (Wood Renton on *Lunacy*, p. 64), and both the criminal and the civil liability for homicide of a drunken person are in dispute, some judges regarding drunkenness as a state of temporary insanity, whether it is produced, like much insanity, by the man's own misconduct, or is consequent on hocussing or the like, but while it lasts depriving him of the consciousness of the nature and quality of his acts necessary to constitute criminal liability for felonious homicide.

In the Indian Penal Code, ss. 85, 86, the view is taken that where the drunkenness arises from intoxicants administered to a man without his knowledge or consent, and renders him incapable of knowing the nature of his acts, or that he is doing what is wrong or contrary to law, he is not liable for an offence then committed. Where a particular knowledge or intent is an element in crime, a man who has intoxicated himself is liable as if he actually had the knowledge or intent (s. 85); but a consent given when in a state of intoxication, causing inability to understand the nature and consequence of the act consented to, is not consent within the code (s. 90). See Steph. *Dig. Cr.*, 5th ed., art. 29; Mayne, *Ind. Crim. Law*, pp. 391, 392. The English decisions on this subject are treated under DRUNKENNESS, *ante*, vol. iv. p. 362.

(*c*) Homicide is also not criminally punishable where it is honestly committed on reasonable belief of the existence of facts which, if true, would have justified or excused it in law, *i.e.* on an honest mistake of fact (*R.* v. *Tolson*, 1889, 23 Q. B. D. 168; Mayne, *Ind. Crim. Law*, 1896, pp. 331–338). See GUILTY MIND.

(*d*) Sec. 7 of the Offences against the Person Act, 1861, expressly excepts from punishment a man who kills another by misfortune or misadventure, or in his own defence, or in any other manner, without felony, *i.e.* without any of the attendant circumstances or intents necessary to constitute the act murder or manslaughter. The exceptions are usually classed as justifiable homicide and excusable homicide; neither consent to death nor duress, even amounting to threat of death, nor necessity, justify or excuse homicide (see Mayne, *Ind. Crim. Law*, 1896, p. 366; *R.* v. *Dudley*, 1884, 14 Q. B. D. 273).

Justifiable homicide is said to be of three kinds—

(1) Execution of a criminal by a proper officer under and in strict conformity with the lawful sentence of a Court of competent jurisdiction.

(2) Slaying by public servants (or other person acting in his aid in the legal exercise of a particular duty for the suppression of treason or felony) of a person who resists or prevents him from executing it. This includes the killing in civil war by the officers of the *de facto* Government, the suppression of riots (*R.* v. *Pinney*, 1831, 3 St. Tri. N. S. 1), and the arrest of fugitive felons (see ARREST). It is immaterial whether the public servants are military or police, provided that they have a public duty to discharge.

(3) Slaying a person in prevention of a serious, forcible, or atrocious crime against person or property, *e.g.* an attempt to murder, ravish, or rob. This applies to all subjects of the Queen, irrespective of the presence or absence of a magistrate.

In cases (2) and (3) the killing will not be justified if there was any reasonable method of executing the duty or preventing the crime without resort to it; and it is not clear that the justification applies to cases where the duty relates to the capture of fugitive misdemeanants, though it does apply to a serious and dangerous riot irrespective of the reading of the Riot Act. The latest exposition of the law on this subject is in the report of the late Lord Bowen on the action of the military in suppressing a riot in Yorkshire (see Parl. Pap. 1894; Mayne, *Ind. Crim. Law*, 1896, 303–307).

Excusable homicide falls under two heads—

(*a*) Where a man in doing a lawful act without negligence, and without intent of hurt, kills another by mishap, misadventure, or misfortune. In such a case this would give rise to neither criminal nor civil liability (see *R.* v. *Salmon*, 1881, 6 Q. B. D. 79; *Stanley* v. *Powell*, [1891] 1 Q. B. 86). But the Courts are astute to find evidence of negligence in such cases (see CHASTISEMENT).

(*b*) Where a man kills another in defence of himself, his parent, wife, child, or servant, and not from any malice or desire of vengeance. It does not extend to the killing of another to avoid a greater evil to the slayer, or from the instinct of self-preservation (*R.* v. *Dudley*, 1884, 14 Q. B. D. 273).

The plea of self-defence is distinct from that usually described as provocation, which is called in to excuse an offensive and not a defensive act (see MANSLAUGHTER; MURDER).

The defence must be against some forcible and illegal attempt against life, honour (in the sexual sense), or liberty, and against the latter only when the attempt is not merely for the purpose of bringing before a Court of justice, but for abduction, kidnapping, or the like (*Broadfoot's* case; Fost. *Crim. Law*, 154; *R.* v. *Sattler*, 1857, 27 L. J. M. C. 50; *R.* v. *Chapman*, 1871, 12 Cox C. C. 4).

(*c*) Where a man kills another in defence of his property against robbery, burglary, and also larceny, or housebreaking, or any malicious damage where the circumstances cause reasonable apprehension that death or grievous harm may result to some person. See BURGLARY, vol. ii. p. 306.

But the excuse is useless, or only effective to reduce the crime from murder to manslaughter, unless the slayer took first every reasonable mode of defence other than killing which the emergency permitted, and used no more force than was reasonably necessary to repel and defeat the attack (1 East, P. C. 272, 287). The difference between justification and excuse is accepted, but narrow. As to homicide by use of explosives, see MANSLAUGHTER; MURDER.

Hong Kong.—An island off the coast of China occupied by the British Government in 1841, formally ceded by the treaty of Nanking in the following year, and now organised as a British colony. The peninsula of Kowloon on the mainland was ceded in 1861, and now forms part of the colony. The government of the colony is administered under letters patent of 19th January 1888 by a governor, assisted by an Executive Council and a small Legislative Council. One of the nominated members of the Legislative Council is usually a Chinese. The Supreme Court at present consists of

the chief justice and one puisne judge. The laws of the colony are English in their origin. From the Supreme Court there is an appeal to the Queen in Council: for conditions of appeal, see PRIVY COUNCIL.

[*Authorities.*—Colonial Office List, and Hong Kong Ordinances, especially the Supreme Court Ordinance of 1873. A revised code of civil procedure is being prepared by Chief Justice Sir J. W. Carrington.]

Honorary—

Canons.—As to appointment of, see DEAN AND CHAPTER, vol. iv. at p. 117.

Trustees.—A term applied to the trustees appointed to preserve contingent remainders. See vol. iii. at p. 324.

Honour.—*A.* The law relating to the acceptance and payment of a bill of exchange for honour is codified by secs. 65 to 68 of the Bills of Exchange Act, 1882.

1. Where the bill has been protested for dishonour by *non-acceptance*, or for better security, and is not overdue, any person, not being a party already liable thereon, may, *with the consent of the holder*, intervene and accept the bill, supra protest, for the honour of any party liable thereon, or for the honour of the person for whose account it is drawn. The acceptance must be written on the bill and signed. It may be for part only of the sum. Unless it states otherwise, it is deemed to be for the honour of the drawer. If the bill is payable after sight, maturity is calculated from the noting for non-acceptance (s. 65). The acceptor for honour is liable for the payment of the bill to the holder, and also to all parties subsequent to the party for whose honour he accepts, but only if the bill is duly presented for *payment* to the drawee, and protested for non-payment, and the acceptor has notice of these facts (s. 66). As to presentment for payment, and the other "general duties of the holder," see s. 67 (2) and vol. ii. p. 101. And if the bill contains a reference in case of need (vol. ii. p. 96), it must be protested for non-payment before it is presented to the acceptor for honour or referee (s. 67). If dishonoured by the acceptor for honour it must be protested for non-payment (s. 67 (4)).

2. Where a bill has been protested for *non-payment*, any person may intervene and pay it supra protest for the honour of any party liable thereon, or for the honour of the person on whose account it is drawn. If two or more persons offer to pay, he whose payment will discharge most parties is to be preferred. The payment must be attested by a notarial act of honour appended to the protest, and founded on a declaration by the payer, or his agent, of his intention in paying. Parties subsequent to the party for whose honour the payment is made are discharged, and the payer is put into the shoes of the holder as regards such party and earlier parties liable to him. The payer is entitled to the bill and protest. If the holder refuses payment for honour he loses his rights against the parties who would be discharged thereby.

B. See TITHING.

Honourable.—A titular prefix to the names of certain persons, who assume it either by courtesy, according to custom, or by royal warrant

of precedency, or in virtue of some office. Those who bear it by courtesy are all the sons and daughters of viscounts and barons, and the younger sons of earls; and the custom corresponds to that by which all the sons and daughters of dukes, marquises, and earls bear the courtesy title of lord or lady, or, in the case of the eldest son, one of the inferior territorial titles of his father. After the creation of legal life peers, and in the absence of a custom, there was doubt as to whether their children were to bear this courtesy title, and this matter was settled by a royal warrant of precedency in August 1897 announcing that the children of legal life peers, and the children of those deceased, should in future bear the prefix of Honourable, and take precedence immediately after the younger children of barons and immediately before baronets. Honourables of the second class are the judges of the High Court, County Court judges (by a warrant of rank and precedence of 1884, which also fixed their precedence next after knights bachelors), maids of honour, and members of Executive and Legislative Councils of the colonies with responsible government.

By virtue of their office also Privy Councillors have the style "Right Honourable." The customary modes of addressing documents, letters, etc., in which the prefixes Honourable, Right Honourable, Most Honourable are used in addressing members of the peerage are rather matters of social observance than of title.

[*Authority.*—Dod, *Peerage, etc.*]

Honour, Titles of; Dignities.—*Titles of Honour* or *Dignities* are certain personal distinctions or titles held or conferred by the sovereign. If any difference is to be observed between them, the dignity is the honour itself; the title of honour is the description of the person who bears it; an earldom being the dignity, the title earl is the title of honour; but it is usual to speak either of the dignity of an earldom or of an earl.

Some of these dignities, or titles of honour, having originally been annexed to the possession of lands granted by the feudal sovereigns, were considered incorporeal hereditaments (*q.v.*), and are still classed under the head of real property; all the various degrees of nobility are of this class; the dignities of Duke, Marquis, Earl, Viscount, and Baron. The dignity, or title of honour, of a baronetcy (*q.v.*), though not of feudal origin, and though it may not be granted of a place, is also an incorporeal hereditament; and, as such, is like the other above-named descendible dignities (*In re Sir J. Rivett-Carnac's Will*, 1885, 30 Ch. D. 136). Upon the question of the creation and descent, etc., of this class of dignities, see article PEERAGE.

Other dignities not hereditary are the knights of the various Orders (*q.v.*), and knights bachelors (*q.v.*). Esquires (*q.v.*) and gentlemen (*q.v.*), although they are reckoned amongst the lesser nobility by Sir Edward Coke (since one is practically the other, for every esquire is a gentleman, and every gentleman is *arma gerens*), are impliedly excluded from the holders of titles of honour or dignities. At page 667, *Inst.* Part II., he says: "Having spoken of all the names of dignity, let us now speak of the names of worship; these being esquire and gentleman."

Amongst the other non-hereditary dignities are the spiritual and other life peers, whether lords of Parliament or not, as being of the nobility.

Titles of honour or names of dignities are not "additions," but part of the same; not like the additions of estate, in the case of esquire or gentleman, or of trade as in the case of a merchant. Since the abolition of pleas

in abatement for misnomer and want of addition, the proper statement of titles and dignities is not of so much importance, but attention is still to be paid to them. If a man has an inferior name of dignity he is to be named by his Christian name and surname, with the name of the dignity; if he is of the peerage, by his Christian name only, and name of dignity which stands for his surname; in the latter case, too, he signs with the name of the dignity, without his Christian name or surname; and with that of the highest if he has more than one. The same rule applies where a woman holds a dignity in her own right. As to the rank a woman holds by marriage, see PRECEDENCE and PEERAGE.

[*Authorities.*—Coke, *Inst.* Part II. ii. p. 665; *Inst.* iv. p. 362; Selden, tit. "Hon." chs. v. and ix.; Black. *Com.* bk. i. ch. xii.; 2 Stephen, *Com.* bk. iv. ch. ix.; Com. *Dig.* tit. "Dignity," p. 403.]

Hops appear not to be within the Sale of Food and Drugs Acts, unless sold for medicinal purposes (see *James* v. *Jones*, [1894] 1 Q. B. 304).

1. Their adulteration is punishable under 7 Geo. II. c. 19, by a penalty of £5 per cwt. for all hops sophisticated, *i.e.* mixed with any ingredient or drug to alter their colour or scent. This includes smoking them with sulphur (*R.* v. *Pack*, 1795, 6 T. R. 374).

The trade in hops is regulated by three statutes (1799, 39 & 40 Geo. III. c. 81; 1814, 54 Geo. III. c. 123; 1866, 29 & 30 Vict. c. 37), which aim at the prevention of frauds on purchasers. Hops must not be put in bags of a greater gross weight than 10 lb. for every cwt. of hops contained in the bags (1799, s. 3), and the growers must put their names on bags or pockets (1814, s. 1).

Foreign hops must not be rebagged in British bags (1866, s. 7). The bags or pockets must also, under penalty, be marked by owner, grower, or planter with the weight and year and place of growth (1866, ss. 2, 3). A penalty is also incurred for false descriptions, symbols, or trade marks (s. 4), and mixing of hops of different qualities or values is prohibited (1866, ss. 5, 6).

The sale of hops improperly marked or not marked is an offence unless done in *bonâ fide* belief that proper marks were on the pockets (s. 6), as is wilful alteration of any mark (s. 8). Justices may issue search warrants for bags improperly marked (s. 10). The seller of hops in marked bags warrants the genuineness of the description (s. 18). The vendor thereof can be made to disclose whence he bought or got them, under penalty of fine. Refusal or neglect to do so is conclusive evidence against himself that he knew the marks to be improper (s. 9). The penalties appear to be recoverable by action under the Merchandise Marks Act, 1862 (25 & 26 Vict. c. 88, s. 15), without prejudice to any civil remedies for damages (1866, ss. 13, 14, 19). The repeal of the Act of 1862 by the Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28, s. 23), has caused some confusion as to the procedure; but the latter Act also deals with the above offences so far as they involve false trade description.

2. Theft of growing hops or their destruction or damage with larcenous intent is punishable under sec. 37 of the Larceny Act, 1861 (24 & 25 Vict. c. 96). Setting fire to a hop oast is felony within sec. 3 of the Malicious Damage Act, 1861 (c. 97). Destroying hop binds growing on poles in a hop plantation is felony under sec. 19 of the same Act, and sec. 24 provides a summary remedy for malicious damage to growing hops.

As to the rating and tithing of hop grounds, see RATING; TITHES.

Horses.—*Introductory.*—With a view to encourage the breeding of strong and useful horses in this country, statutes have from time to time been passed prohibiting their exportation or restraining the excessive increase of horse-races; but the number and value of the Royal Plates, and the high prices paid for well-bred horses, were considered to have rendered this legislation unnecessary, and these statutes have, therefore, all been repealed. There are, however, still a variety of statutes relating to the horse, and the older reports abound in cases in which it is the subject-matter of the action. In this article it is proposed, first, to give a synopsis of these statutes, and, secondly, to deal with some of the more important points which have come before the Courts relating to the sale, etc., of horses.

I. *Horse Stealing, etc.*—By 24 & 25 Vict. c. 96, s. 1, the stealing of any horse, mare, gelding, colt, or filly is felony, punishable with penal servitude for any term not exceeding fourteen years, or imprisonment for any term not exceeding two years with or without hard labour; and by sec. 11, the wilful killing of any animal with intent to steal the carcass, skin, or any part of such animal, is also made felony, and is punishable in like manner as the felonious stealing of the same, provided the offence of stealing the animal so killed would have amounted to felony.

If a horse in a close is taken with intent to steal him, but the thief is caught before he gets out of the close, the offence is complete (1 Hale, 508). And where the prisoner went into the stable of an inn, and, pointing to a mare, said to the ostler, "That is my horse, saddle him," and the ostler did so, and the prisoner tried to mount the mare in the inn yard, but failing to do so, directed the ostler to lead the mare out of the yard for him to mount, and the ostler led her out, but before the prisoner had time to mount her a person who knew the mare came up and the prisoner was secured, it was held that if the prisoner caused the mare to be led out of the stable intending to steal her, that was a sufficient taking to constitute a felony (*R.* v. *Pitman*, 1826, 2 Car. & P. 423). If a horse is hired for the day by a person intending at the time of hiring to appropriate it, and it is accordingly taken away and sold, a felony is committed, because the owner did not intend to relinquish his property in the horse, but only the temporary possession (*R.* v. *Pear*, 1789, 1 Leach, 521; *R.* v. *Pratt*, 1828, 1 Moo. C. C. 185). So where the prisoner hired a horse with the intention of converting it to his own use, and afterwards offered it for sale, but no sale took place, it was held nevertheless that he was guilty of larceny (*R.* v. *Janson*, 1849, 4 Cox C. C. 82, overruling *R.* v. *Brooks*, 1838, 8 Car. & P. 295). But where a horse is hired for a particular purpose the selling him after that purpose is accomplished will not constitute a new felonious taking (*R.* v. *Banks*, 1821, Russ. & R. 441).

A taking with the bare intent to use a horse, though unlawfully, will be only a trespass, if the jury are satisfied that such was the original intention (*R.* v. *Phillips*, 1801, 2 East, P. C. c. 16, s. 98); and if a person stealing other property takes a horse, not with intent to steal it, but only to get off more conveniently with the stolen property, the taking of the horse is not a felony (*R.* v. *Crump*, 1825, 1 Car. & P. 658).

By 26 & 27 Vict. c. 103, taking fodder by a servant contrary to order, to feed his master's horse, is not to be felony, but is to be punishable summarily.

Sale in Market Overt—Recovery of Stolen Horses.—Although as a general rule the purchaser of stolen goods in market overt acquires a title to them, this is not the case with regard to stolen horses. For a purchaser

gains no property in a horse which has been stolen unless he buys it in a fair or market overt, according to the directions of the Statutes 2 & 3 Phil. & Mary, c. 7, and 31 Eliz. c. 12. By these statutes it is enacted that the horse which is for sale shall be openly exposed in the time of such fair or market, for one whole hour together, between ten in the morning and sunset, in the public place used for such sales, and not in any private yard or stable; and afterwards brought by both the seller and buyer to the bookkeeper of such fair or market; that toll be paid, if any be due, and if not, one penny to the bookkeeper, who shall enter down the price, colour, and marks of the horse, with the names, additions, and abodes of the buyer and seller, the latter being properly attested.

The sale of a horse under these statutory regulations does not take away the property of the owner, if within six months after the horse is stolen he puts in his claim before some magistrate where the horse shall be found, and within forty days more proves it to be his property by the oath of two witnesses, and tenders to the person in possession such price as he *bonâ fide* paid for him in market overt (31 Eliz. c. 12, s. 4).

Unless, however, it is proved that the horse was stolen, a magistrate has no authority to restore it; and, therefore, where a complaint was made to a magistrate by A., the owner, that his horse had been stolen by B., without actual proof of its having been stolen, it was held that an officer, although armed with a warrant against B., was not justified in taking the horse out of the possession of the *bonâ fide* purchaser from B. (*Joseph* v. *Adkins*, 1817, 2 Stark. N. P. 76).

The onus of showing that the formalities required by the statute have been observed lies on the buyer (*Moran* v. *Pitt*, 1873, 42 L. J. Q. B. 47; 28 L. T. N. S. 554). But where no evidence was given of compliance with the statutory regulations, a *bonâ fide* purchaser of a horse from a person who had bought it at a fair was held entitled to maintain trover against the original owner for retaking it (*North* v. *Jackson*, 1859, 2 F. & F. 198). A mere repository for horses is not market overt (*Lee* v. *Bayes*, 1856, 18 C. B. 601).

Killing or Maiming Horses.—By 24 & 25 Vict. c. 97, s. 40, the unlawful and malicious killing, maiming, or wounding any cattle is felony, punishable in like manner as horse-stealing (*supra*). The word "cattle" includes horses (*R.* v. *Patey*, 1770, 2 Black. W. 721). The distinction between maiming and wounding appears to be that the former implies permanent injury, while the latter does not necessarily do so (*R.* v. *Jeans*, 1844, 1 Car. & Kir. 539; *R.* v. *Haywood*, 1801, Russ. & R. 16). It is not necessary to constitute wounding that any instrument other than the hand should be used (*R.* v. *Bullock*, 1868, L. R. 1 C. C. R. 115; 37 L. J. M. C. 47). The offence need not be proved to have been committed from malice against the owner (24 & 25 Vict. c. 97, s. 58), but an evil intent in the prisoner must appear (*R.* v. *Tivey*, 1845, 1 Car. & Kir. 704; *R.* v. *Mogg*, 1834, 4 Car. & P. 364). Where the act is cruel and wanton, the law will imply malice (*R.* v. *Welsh*, 1875, 1 Q. B. D. 23; 45 L. J. M. C. 17).

Drugging Horses.—By the Drugging of Animals Act, 1876 (39 & 40 Vict. c. 13), the practice of administering poisonous drugs to horses and other animals by disqualified persons, and without the knowledge and consent of the owner of such animals, is made punishable by fine or imprisonment. The Act does not extend to the owner of the animal, nor anyone acting under his authority, nor does it exempt a person from punishment under any other Act, so that he be not punished more than once for the same offence.

Soldier making away, etc., with Horse.—By sec. 24 of the Army Act, 1881 (44 & 45 Vict. c. 58), a soldier who makes away with (whether by pawning, selling, destruction, or otherwise) any horse of which he has charge; or loses by neglect, or wilfully injures such horse; or ill-treats any horse used in the public service, is liable on conviction by court-martial to imprisonment or such less punishment as is mentioned in the Act.

Slaughtering Horses.—Under the Knackers Act, 1786 (26 Geo. III. c. 71), s. 1, every person keeping a knackers' yard must take out a licence, which may be granted by Quarter Sessions on a certificate under the hands and seals of the minister and churchwardens or overseers, or of the minister and two or more householders of the parish. The person licensed is to affix to his house his name and the words "Licensed for slaughtering horses," pursuant to the Act (s. 2). The vestry are to appoint an inspector to whom notice of the intention to slaughter any horse, etc., is to be given, and a record is to be kept of all animals brought to the licensed premises to be slaughtered (ss. 3–5). If the person bringing them does not satisfactorily account for their possession, he may be taken before a justice and committed to prison (s. 7). Persons are punishable who slaughter horses, etc., for any other purpose than for butcher's meat, or who flay dead animals brought to the place without a licence (ss. 8, 9). Penalties are imposed on persons making false entries in their books (s. 10), and on those lending any house, etc., for the purpose of slaughtering without a licence (s. 13). The Act does not extend to curriers, etc., killing distempered animals (s. 14), but a penalty is imposed upon such persons killing sound horses (s. 15).

This Act is amended by 7 & 8 Vict. c. 87, under which the licences are to be annual, but may be renewed without fresh certificates, and cancelled for contravention of the Acts (ss. 1, 2).

These Acts, like the 2 Phil. & Mary, c. 7, and 31 Eliz. c. 12 (*supra*), were passed with the object of repressing horse-stealing. They are both repealed as regards the metropolis by the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), which, by sec. 20, makes special provision for the licensing of such places in London outside the city. The powers of the Quarter Sessions as to licensing are now transferred to the district council or county borough (56 & 57 Vict. c. 73, ss. 27 (2), 32), and those of the vestry to the parish council or meeting (*ibid.* ss. 6 (1, *a*), 19 (4)).

The Knackers Act is further amended by the Cruelty to Animals Act, 1849 (12 & 13 Vict. c. 92), by which neglect on the part of the licensed person to affix his name, etc., to his premises is rendered penal (s. 7); regulations are made with regard to the treatment of horses, etc., sent to be slaughtered (s. 8); a penalty is imposed for using or employing any horse intended for slaughter (s. 9); and a licensed knacker is prohibited from exercising the trade of a horse-dealer (s. 11).

Slaughter of Injured Horses.—By the Injured Animals Act, 1894 (57 & 58 Vict. c. 22), s. 1, a constable who finds any horse, etc., so severely injured that it cannot without cruelty be led away, shall, if the owner is absent or refuses to consent to its destruction, at once summon a duly registered veterinary surgeon, if such a person resides within a reasonable distance; and if it appears by his certificate that the animal is mortally injured, or so severely that it is cruel to keep it alive, the constable may without the consent of the owner cause the animal to be slaughtered. Any reasonable expense which may be incurred by the constable in so slaughtering the animal or removing its carcass may be recovered from the owner summarily (s. 2).

The object of the Act appears to be the slaughter of horses injured by accidents in the streets. If no veterinary surgeon resides within reasonable distance, it would appear that the constable would have no power to slaughter the animal without the consent of the owner.

Exposure of Diseased Horses.—By the Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57), s. 22 (xxxv. xxxvi.), the Board of Agriculture may make orders for extending for all or any of the purposes of the Act, the definition of "disease," so that it shall for those purposes comprise any disease of animals, and for extending the definition of "animals" so that it shall comprise any kind of four-footed beast. Accordingly, by the Glanders or Farcy Order, 1894, horses, etc., are to be deemed "animals," and glanders, including farcy, a "disease." The exposure of a diseased horse in a sale-yard or other public or private place, where horses, etc., are commonly exposed for sale, is prohibited. And provisions are made against placing a diseased horse in a lair, etc., adjacent to a market or fair, and also with regard to the carriage and pasturing of diseased horses.

Horseflesh.—By the Sale of Horseflesh, etc., Regulation Act, 1889 (52 & 53 Vict. c. 11), s. 1, the sale of horseflesh for human food elsewhere than in any shop, etc., over which there shall appear in legible characters, words indicating that horseflesh is sold there, is prohibited. It is not to be supplied for human food to any person who has asked for other meat (s. 2). Provision is made for the inspection by any medical officer of health, etc., of any meat which he has reason to believe is horseflesh, exposed for sale, and intended for human food in any place other than such shop, etc., and if it appears to be so, he may seize it (s. 3). On complaint made on oath by any such officer, any justice may grant him a search warrant (s. 4). The justice may make such order with regard to the meat seized as he thinks desirable, and the person in whose possession the meat was found is to be deemed to have committed an offence under the Act, unless he proves that it was not intended for human food (s. 5). A penalty not exceeding £20 is imposed for every such offence (s. 6). "Horseflesh" includes flesh of asses and mules, and means horseflesh cooked or uncooked, alone or accompanied by or mixed with any other substance (s. 7).

Horsedealer.—A horsedealer, strictly, is a person who by his traffic "distributes" horses (*Allen* v. *Sharp*, 1848, 2 Ex. Rep. 357, per Alderson, B.). He was defined by 29 Geo. III. c. 49, s. 5 (repealed), to be a person who "seeks his living by buying and selling horses." Presumably, the proprietor of Aldridge's is a horsedealer (*Allen* v. *Sharp*, *ubi supra*). He no longer has to pay duty (37 & 38 Vict. c. 16, s. 11). His premises are a "shop" within the meaning of sec. 13 of the Markets and Fairs Act (10 & 11 Vict. c. 14) (*Fearon* v. *Mitchell*, 1872, L. R. 7 Q. B. 690). And he cannot maintain an action upon a contract for the sale and warranty of a horse made by him upon a Sunday (*Fennell* v. *Ridler*, 1826, Barn. & Cress. 406).

By sec. 19, subsec. (5) of the Customs, etc., Act, 1869 (32 & 33 Vict. c. 14), he need not, if he has made entry of his premises in accordance with sec. 28 of that Act, take out a licence for any servant employed by him at such premises in the course of his trade, other than a servant employed to drive a carriage with any horse let to hire for any period exceeding twenty-eight days; provided that he has complied with all the provisions contained in that section.

Horse-Racing.—With the exception of the Racecourses Licensing Act, 1879 (42 & 43 Vict. c. 18), there are no longer any statutory restrictions against racing. By sec. 1 of that Act, a "horse-race" means any race in

which any horse, mare, or gelding shall run in competition with any other horse, etc., or against time, for any prize of what nature or kind soever, or for any bet or wager made in respect of any such horse, etc., or the riders thereof, and at which more than twenty persons are present; and (s. 2) declares all horse-races unlawful within ten miles of Charing Cross, unless licensed pursuant to the provisions of secs. 3 and 4 of the Act. Penalties are imposed on persons convicted of taking part in unlicensed horse-races, and on the owners and occupiers of the ground where such races take place (ss. 5, 6); and every race held in contravention of the Act is to be deemed a nuisance (s. 7).

There is no longer any duty payable on race-horses (37 & 38 Vict. c. 16, ss. 11, 21). As to betting on horse-races, see BETTING.

II. *Sale, etc., of Horses.*—The sale of horses otherwise than in market overt is governed by the same rules of law as the sale of other goods, and these rules have recently been codified by the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71). By sec. 22, subsec. (2) of that Act nothing therein contained shall affect the law relating to the sale of horses, *i.e.* their sale in market overt as provided for by 2 & 3 Phil. & Mary, c. 7, and 31 Eliz. c. 12 (*supra*). But there are many incidents in the sale of horses which do not occur in the case of sales of other goods, and the law of warranty, although it is equally applicable to the sale of other goods, has become inseparably associated with the sale of a horse. These incidents have raised a considerable body of what has sometimes been called "horse law," and it is proposed to deal with them as fully as the limits of this article will permit.

Unsoundness and Vice.—In buying and selling horses it is of great importance to ascertain what constitutes unsoundness, and what habits are to be considered vices.

According to Best, C.J., the word "sound" means perfect (*Best* v. *Osborne*, 1825, Russ. & M. 290); and according to Parke, B., it means what it expresses, namely, that the animal is sound and free from disease at the time he is warranted (*Kiddell* v. *Burnard*, 1842, 9 Mee. & W. 670). The rule as to unsoundness is, that if, at the time of sale, the horse has any disease, which either actually does diminish his natural usefulness, so as to make him less capable of work of any description; or which, in its ordinary progress, will diminish his natural usefulness, or if he has, either from disease or from accident, undergone any alteration of structure, that either does or in its ordinary effects will diminish his usefulness, such a horse is unsound (*Kiddell* v. *Burnard*, 1842, 9 Mee. & W. 670; *Coates* v. *Stephens*, 1838, 2 Moo. & R. 157). The rule as to unsoundness applies to cases of disease and accident which from their nature are only temporary, it not being necessary that the disorder should be permanent and incurable (*Elton* v. *Jordan*, 1815, 1 Stark. N. P. 127; 18 R. R. 754; *Kiddell* v. *Burnard, ubi supra*).

A vice is a bad habit, and a bad habit to constitute vice must either be shown in the temper of the horse, so as to make him dangerous, or diminish his natural usefulness; or it must be a habit decidedly injurious to his health (*Scholefield* v. *Robb*, 1839, 2 Moo. & R. 210).

The soundness or unsoundness of a horse is a question peculiarly fit for the consideration of a jury, and the Court will not set aside a verdict on account of there being a preponderance of evidence the other way (*Lewis* v. *Peake*, 1816, 7 Taun. 153; 17 R. R. 275).

As to the various diseases, defects, or alterations in structure, and bad habits which constitute unsoundness or vice, see Oliphant on *Horses*, 5th ed., pp. 66–102.

Warranty.—In a contract of sale, unless the circumstances are such as to show a different intention, there is an implied warranty of title (Sale of Goods Act, 1893, s. 12). Upon the sale of a horse, therefore, the law will imply a warranty on the part of the seller that he has a right to sell it (*Edwards* v. *Pearson*, 1890, 6 T. L. R. 220). But there is no implied warranty of the quality of the horse, unless there are some circumstances beyond the mere fact of the sale from which it may be implied (*Chanter* v. *Hopkins*, 1838, 4 Mee. & W. 399; *Ward* v. *Hobbs*, 1878, 4 App. Cas. 13; 48 L. J. C. P. 281; Sale of Goods Act, 1893, s. 14). The maxim *caveat emptor* (*q.v.*) is the general rule applicable to sales, so far as quality is concerned, and except there is fraud, or an express warranty, or a warranty is implied from the circumstances of the sale, the buyer has no right of action against the seller in the event of the animal turning out to be unsound, or restive, or unfit for use (*Hill* v. *Balls*, 1857, 2 H. & N. 304; 27 L. J. Ex 45).

The reason laid down for requiring a warranty of soundness in buying a horse is, that it is well known they have secret maladies which cannot be discovered by the usual trials and inspections, and that a warranty prevents the purchaser from being damnified by those latent defects against which no prudence can guard (1 Rol. *Abr.* 90; *Jones* v. *Bright*, 1829, 5 Bing. 544). A buyer, therefore, who means to protect himself against hidden defects should insist on a warranty, and he is not protected otherwise unless he can make out fraud (*Ormrod* v. *Huth*, 1845, 14 Mee. & W. 661).

The term "warranty" means an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated (Sale of Goods Act, 1893, s. 62, subs. (1)).

No particular words are necessary to constitute a warranty; if a man says, "This horse is sound," that is a warranty (*Salmon* v. *Ward*, 1825, 2 Car. & P. 211, per Best, C.J.). It is not necessary that the seller should say "I warrant"; it is sufficient if he says that the article is of a particular quality, or is fit for a particular purpose (*Jones* v. *Bright*, 1829, 3 Moo. & P. 173, per Best, C.J.). The general rule laid down by Bayley, J., is, that whatever the seller represents at the time of sale is a warranty (*Wood* v. *Smith*, 1829, 4 Car. & P. 45). Therefore, if a person at the time of sale says, "You may depend upon it the horse is perfectly quiet and free from vice," it is a warranty (*Carr* v. *Colman*, 1828, 3 Moo. & R. 2). Words, however, of expectation and estimate only do not amount to a warranty (*M'Connel* v. *Murphy*, 1873, L. R. 5 P. C. 203; 28 L. T. 713). A sound price is not tantamount to a warranty of soundness (*Parkinson* v. *Lee*, 1802, 2 East, 323; 6 R. R. 429). A warranty may be either general or qualified. A general warranty is an unconditional undertaking that the horse really is what the warrantor professes it to be (Oliphant, 5th ed., 110). If a person at the time of the sale says, "I never warrant, but he is sound so far as I know," it is a qualified warranty, and an action for the breach of it may be maintained by the purchaser, if it can be proved that the seller knew of the unsoundness (*Wood* v. *Smith*, 1829, 4 Car. & P. 45; *Pinder* v. *Button*, 1862, 7 L. T. 269).

By the conditions of sale at repositories and public auctions, a specified short time is usually allowed, within which the buyer must give notice of any breach of warranty. If he neglects to do this, he has no remedy, unless such condition has been rendered inoperative by fraud or artifice. Where a warranty was to last until noon of the following day, when the sale was to become complete, Littledale, J., said, "The warranty here was as if the

vendor had said, 'After twenty-four hours I do not warrant'; such a stipulation is not unreasonable" (*Bywater* v. *Richardson*, 1834, 1 Ad. & E. 508; see also *Chapman* v. *Gwyther*, 1866, L. R. 1 Q. B. 463; 35 L. J. Q. B. 142; *Hinchcliffe* v. *Barwick*, 1880, 5 Ex. D. 177; 49 L. J. Ex. 495, C. A.).

The purchaser, however, may return the horse at any time within that specified in the conditions of sale, even though he has notice of the breach of warranty before he removes the horse, and the latter, through an accident having happened to it whilst it was in his possession, but not by his default, becomes depreciated in value (*Head* v. *Tattersall*, 1871, L. R. 7 Ex. 7; 41 L. J. Ex. 4). But the mere fact of the contract of sale containing a condition for the return of the horse within a specified short time, in the event of its not answering the warranty given, will not deprive the buyer of his remedy for the breach, if the performance has become impossible without any fault on the part of the seller (*Taylor* v. *Caldwell*, 1863, 3 B. & S. 826; see also *Chapman* v. *Withers*, 1888, 20 Q. B. D. 824; 57 L. J. Q. B. 457).

Where there is any suspicious place apparent to the parties which they discuss, or if the seller knows of some defect and does not wish to answer for any unsoundness which may proceed from it, he should give a warranty specially exempting his liability for any unsoundness which may proceed from the defect in question (*Jones* v. *Cowley*, 1825, 4 Barn. & Cress. 445; *Hemming* v. *Parry*, 1834, 6 Car. & P. 580), or expressly state what he warrants.

A warranty need not be in writing, but it is obviously safer to take a written warranty, which should comprehend not only soundness, but freedom from vice, and also quietness and age, if necessary (Oliphant, 5th ed., 113). The parties are bound by the written warranty alone, unless some fraud can be shown; and even if there be a representation it does not avail (*Pickering* v. *Dawson*, 1813, 4 Taun. 785).

According to Blackstone (3 *Com.* 165), "A warranty can only reach to things in being at the time of the warranty, and not to things in future, as that a horse is sound at the time of buying him, not that he will be sound two years hence." But a future event may be warranted if there be an express undertaking to that effect (*Eden* v. *Parkinson*, 1781, Doug. 732 *a*); and it makes no difference whether the warranty be made at the time of sale or before sale, so long as the sale is made on the faith of the warranty (*Pasley* v. *Freeman*, 1789, 3 T. R. 59; 1 R. R. 634).

If a man sells a horse generally, he warrants no more than that it is a horse. But if the buyer asks for a horse to carry a lady, or to drive in a particular carriage, he who knows the qualities of the animal and sells, undertakes on every principle of honesty that it is fit for the purpose indicated; but if it should turn out that the horse was vicious, or had never been in harness, the buyer would be entitled to recover, on proving that it was unfit for the purpose for which it was sold (*Jones* v. *Bright*, 1829, 5 Bing. 544; see also *Jones* v. *Just*, 1868, L. R. 3 Q. B. 197).

In all cases of warranty as to the quality of the thing sold, as, for instance, where a horse is warranted sound or the like, the warrantor undertakes that it is true at the time of making it; and the law annexes a tacit contract that if it be otherwise than warranted, the seller shall make compensation to the buyer (*Fielder* v. *Starkin*, 1788, 1 Black. H. 17; 2 R. R. 700). From this it follows that the seller will be liable for any latent defect, *i.e.* for all faults, known or unknown to him, inconsistent with the warranty (*Parkinson* v. *Lee*, 1802, 2 East, 821; 6 R. R. 429).

Where a horse is sold with a warranty, any fraud at the time of he sale

will avoid the contract, though it is not on any point included in the warranty (*Stewart* v. *Cowell*, 1823, 1 Car. & P. 23). But the contract is not avoided by some immaterial representation in the warranty proving untrue, *e.g.* by a misrepresentation as to the place from which the horse was brought (*Geddes* v. *Pennington*, 1817, 5 Dow, 163).

The servant of a private owner intrusted with the sale of a horse on one particular occasion has no implied authority to warrant (*Brady* v. *Todd*, 1861, 9 C. B. N. S. 592; 30 L. J. C. P. 223), except where the sale takes place at a fair or other public mart (*Alexander* v. *Gibson*, 1811, 2 Camp. 555; 11 R. R. 797; *Brooks* v. *Hassall*, 1883, 49 L. T. 569). But in the case of a sale by the servant of a horsedealer there is an implied authority to warrant wherever the sale may take place (*Howard* v. *Sheward*, 1866, L. R. 2 C. P. 148; 36 L. J. C. P. 42); and the latter will be bound by a warranty given by his servant, even though he has expressly forbidden him to give one (*Pickering* v. *Busk*, 1812, 15 East, 45; 13 R. R. 364).

A general warranty does not cover patent defects, as if a horse warranted perfect be *minus* an eye or a tail (2 Black. *Com.* 165); as in such cases the maxim *caveat emptor* applies. But blindness or a serious defect in the sight is not necessarily a patent defect, as in the case of "glass eye" (*Southerne* v. *Howe*, 1618, 2 Rol. Rep. 5), or convexity of the eye (*Holyday* v. *Morgan*, 1858, 28 L. J. Q. B. 9), and such defects would therefore be covered by a general warranty of soundness.

The conclusion to be drawn from the cases on this subject appears to be, that the patent defects, which the warranty does not cover, must be so manifest and palpable, as to be necessarily within the knowledge and apprehension of the buyer, and also such defects as at the time of the sale either are, or will inevitably produce, an unsoundness (Oliphant, 5th ed., p. 131).

Where there is a breach of warranty by the seller, the buyer is not by reason only of such breach entitled to reject the horse; but he may (*a*) set up the breach of warranty in diminution of the price; or (*b*) maintain an action against the seller for damages for breach of warranty. The fact that he has set up the breach of warranty in diminution of the price does not prevent him from maintaining an action for the same breach if he has suffered further damage (Sale of Goods Act, 1893, s. 53. See also *Street* v. *Blay*, 1831, 2 Barn. & Adol. 456).

If the warranty be unconditional, the only ground on which the horse can be returned is that of fraud (*Street* v. *Blay*, *ubi supra*). If there is a condition in the contract authorising the return of the horse in the event of his not answering to the warranty, the buyer must return him as soon as he ascertains that this is the case (*Adam* v. *Richards*, 1795, 2 Black. H. 573; 3 R. R. 508). Where the contract is executory only, as where a horse is ordered of a party, and he contracts to supply one for a particular purpose, the buyer may rescind the contract after he has received the horse, if he does not answer that purpose, provided he has not kept it longer than was necessary for trial, or exercised the dominion of an owner over it, as by selling it (*Street* v. *Blay*, *ubi supra*. See also Sale of Goods Act, 1893, s. 11, subs. (1)).

Where a breach of warranty has taken place, the buyer should, in an ordinary case, tender the horse back to the seller immediately on discovering the breach, and so entitle himself to be repaid the expenses he has been put to in keeping him (*Chesterman* v. *Lamb*, 1834, 2 Ad. & E. 129; *Cross* v. *Bartlett*, 1829, 3 Moo. & P. 542); and if the seller receives him back there will be a mutual rescission of the contract (*Watson* v. *Downes*, 1778, Doug. 24). But where the seller refuses to take the horse, he should be sold as

soon as possible by public auction (*Caswell* v. *Coare*, 1809, Taun. 566; 10 R. R. 606). If the buyer does not wish to tender the horse, he should at any rate give notice of the breach of warranty, as his omission to do so will raise a strong presumption that the defect complained of did not exist at the time of the sale (*Fielder* v. *Starkin*, 1788, 1 Black. H. 17; 2 R. R. 700). But where the breach of warranty can be clearly proved, the length of time before notice does not appear material (*Pateshall* v. *Tranter*, 1835, 3 Ad. & E. 103).

The measure of damages for breach of warranty is the estimated loss directly and naturally resulting in the ordinary course of events from the breach. In the case of breach of warranty of quality, such loss is *primâ facie* the difference between the value of the horse at the time of delivery to the buyer and the value it would have had if it had answered to the warranty (Sale of Goods Act, 1893, s. 53, subss. (2), (3)).

If the horse has been returned and no special loss has accrued, the damages consist of the price paid (*Caswell* v. *Coare*, 1809, 1 Taun. 566; 11 R. R. 668). If it has not been returned, the measure of damages will be the difference between its value with the defect warranted against and the value it would have borne without the defect (*Jones* v. *Just*, 1868, L. R. 3 Q. B. 197).

Hiring Horses.—If a horse is let out for hire for the purpose of performing a particular journey, the party letting warrants that it is fit, and proper, and competent for the journey (*Chew* v. *Jones*, 1847, 10 L. T. 231; see also *Hyman* v. *Nye*, 1881, 6 Q. B. D. 685). Even though a particular horse has been selected out of the owner's stables, it makes no difference, as it must be supposed that all are fit for their work (*Chew* v. *Jones*, *ubi supra*). If the hirer treats the horse as any prudent man would act towards his own horse, he is not answerable for any damage the horse may receive (*Cooper* v. *Burton*, 1811, 3 Camp. 5 *n*; 13 R. R. 736). But he is answerable at all events if he keeps the horse after the stipulated time, or uses it differently from his agreement (Jones on *Bailments*, 121). If he hires a horse to go from A. to B., he ought to go by the usual road; for if he makes a material deviation, and any damage ensues, he would appear to be liable for it at all events (*Davis* v. *Garrett*, 1830, 6 Bing. 716). Where there has been no material deviation, and the horse has not been kept after the stipulated time, there must be positive proof of negligence to fix the hirer. If, therefore, an action is brought against him for using a hired horse so negligently that it broke its knees, it will not be sufficient for the plaintiff merely to show that the horse was a good horse, and was not in the habit of falling (*Cooper* v. *Burton*, *ubi supra*). If the horse falls lame on the journey, the hirer may abandon him at any place where he turns out unfit, and give notice of the fact to the party letting him out, whose duty it is to send for him (*Chew* v. *Jones*, 1847, 10 L. T. 231, per Pollock, C.B.). Where the horse's strength is exhausted, and it has refused its feed, the hirer has no right to pursue his journey with it (*Bray* v. *Mayne*, 1818, 1 Gow, 1; 21 R. R. 786). The cure of a hired horse is at the expense of the owner if it is taken sick on the journey agreed upon, without the fault of the hirer (Story on *Bailments*, 258). But if the latter prescribes medicines for it, he is answerable for any improper treatment, as his proper course is to call in a veterinary surgeon (*Dean* v. *Keate*, 1811, 3 Camp. 4; 13 R. R. 735). If a hired horse is injured owing to the negligence of the hirer's servant, the hirer will be liable to make good the damage to the owner, and it makes no difference that the servant was acting beyond the scope of his authority at the time the accident occurred (*Coupé Co.* v. *Maddick*, [1891] 2 Q. B. 418; 65 L. J. Q. B. 676).

If a man hires a carriage and any number of horses and the owner supplies the driver, the hirer is discharged from all attention to the horses, and is therefore not answerable for any damage done by the negligence of the owner's servant (*Samuel* v. *Wright*, 1805, 5 Esp. 265; *Smith* v. *Lawrence*, 1828, 2 Man. & R. K. B. 1). So, if he hires horses to draw his own carriage to a certain place (*Dean* v. *Branthwaite*, 1803, 5 Esp. 35), or to be driven about by the owner's servant wherever the hirer pleases, and for which he gives him a gratuity (*Laugher* v. *Pointer*, 1826, 5 Barn. & Cress. 558; *Quarman* v. *Burnett*, 1840, 6 Mee. & W. 499; see also *Jones* v. *Corporation of Liverpool*, 1885, 14 Q. B. D. 890).

The hirer of a horse or carriage is liable for damage occasioned by the negligence of himself or his servant; and where two persons hire a horse and carriage, they are both answerable for any damage occasioned by the negligent driving of one of them; but if the hiring be by one only, the other, who is a mere passenger, is not liable (*Davey* v. *Chamberlaine*, 1802, 4 Esp. 249).

There may be special circumstances which may render the hirer of job horses and servants responsible for the neglect of a servant, though he is not so by the general relation of master and servant, *e.g.* if he takes the actual management of the horses, or orders the servant to drive in a particular manner which occasions the damage complained of (*Quarman* v. *Burnett*, 1840, 6 Mee. & W. 499, per Parke, B.). Where a carriage and horses are hired, and the driver is a servant of the owner, if the hirer is sitting outside, and has a view of the proceedings, and does not interfere to prevent their misconduct, and an injury ensues, he is a co-trespasser with them, for by not endeavouring to stop their improper proceedings he has adopted their conduct as his own (*M'Laughlin* v. *Pryor*, 1842, 4 Sco. N. R. 655). It is always a question for the jury whether the driver is acting as servant for the hirer or owner; each case of this class must therefore depend upon its own circumstances (*Brady* v. *Giles*, 1835, 1 Moo. & R. 496, per Lord Abinger).

Borrowing Horses.—The duties of the lender and borrower of a horse are in some degree correlative. The horse must be taken to be lent for the purpose of a beneficial use by the borrower; the latter therefore is not responsible for reasonable wear and tear; but he is for negligence, misuse, or gross want of skill in the use, and above all for fraud. On the other hand, the lender is responsible for defects in the horse, with reference to the use for which he knows the loan is accepted, of which he is aware, and owing to which the borrower is injured (see *Blackmore* v. *Bristol, etc., Ry. Co.*, 1858, 27 L. J. Q. B. 167, per Coleridge, J.). The owner of a horse is therefore responsible if, knowing it to be vicious and unmanageable, he lends it to a person who is ignorant of its bad qualities, and the rider, using ordinary care, is thrown from it and injured (*ibid.*). If the lender has not been deceived but perfectly knew the quality as well as the age of the borrower, he must be supposed to have demanded no higher skill than that of which such a person was capable (Jones on *Bailments*, 65). The borrower is bound to use such skill as he actually possesses, or may be implied from his profession or situation (*Wilson* v. *Brett*, 1843, 11 Mee. & W. 113). He is not liable to the owner for an injury due to the negligence of a stranger (*Claridge* v. *South Staffordshire Tramway Co.*, [1893] 1 Q. B. 422). The use is to be confined to the borrower, unless a more extensive use can be implied from other circumstances, such, for instance, as lending the horse on trial (*Camoys* v. *Scurr*, 1840, 9 Car. & P. 386). A borrowed horse therefore cannot be used by a servant (*Bringloe* v. *Morrice*, 1675, 3 Salk. 271). It must be used according to the purpose

for which it is lent, or the borrower will be liable for any accident which may happen to it, whether by his default or not (Noy's *Maxims*, 91). The borrower is bound to feed the horse during the time of the loan (*Handford* v. *Palmer*, 1820, B. & B. 359), and if it is returned out of condition he may be called upon to prove that he fed it properly, and that the falling off in condition did not arise from any neglect on his part (*Bray* v. *Mayne*, 1813, 1 Gow, 1; 21 R. R. 786).

Horsebreaker, etc.—A horsebreaker is liable for any damage which through his negligence may happen to the horse he is breaking (Lib. Plac. 25).

The horsebreaker by whose skill the horse is rendered manageable has a lien upon him in respect of his charges; and such lien being consistent with the principles of natural equity, is favoured by the law, which in such case is construed liberally (*Scarfe* v. *Morgan*, 1838, 4 Mee. & W. 276). In like manner, the labour and skill employed on a racehorse by a trainer are a good foundation for a lien. But if by usage or contract the owner may send the horse to run at any race he chooses, and may select the jockey, the trainer has no continuing right of possession, and consequently no lien (*Forth* v. *Simpson*, 1849, 13 Q. B. 680; see also *Jackson* v. *Cummins*, 1839, 5 Mee. & W. 350). The owner of a stallion is also entitled to a specific lien on the mare, in respect of his charge for covering her (*Scarfe* v. *Morgan*, 1838, 4 Mee. & W. 270).

As to carrying horses, see ANIMALS; CARRIER; see also AGISTMENT; FARRIER; INNKEEPER; LIVERY STABLE; NEGLIGENT DRIVING; QUIET IN HARNESS; RULE OF THE ROAD; VETERINARY SURGEON.

[*Authority.*—Oliphant on *Horses*, 5th ed., by C. E. Lloyd.

Hosiery Manufactures.—The Hosiery Manufacture Wages Act, 1874 (37 & 38 Vict. c. 38), provides that all wages in the hosiery manufacture are to be paid in the current coin of the realm, without any deduction or stoppage of any description whatever except for bad and disputed workmanship (s. 1). All contracts to stop wages and all contracts for frame rents and charges between employers and artificers are illegal, null and void (s. 2), and no action, suit, or set-off between employer and artificer is to be allowed for any such deduction or on any such contract (s. 5), but this is not to prevent the recovery by the employer of any debt due to him by the artificer (s. 6). As to penalties for illegal deductions (s. 3) or illegal use of frames (s. 4), see article COUNTY COURTS, vol. iii. at p. 547; and note that deduction of fines for absence without permission is not within sec. 3, *supra* (*Willis* v. *Thorp*, 1875, L. R. 10 Q. B. 383). For the purposes of the Act—(1) all workmen, labourers, and other persons in any manner engaged in the performance of any employment or operation of what nature soever in or about a hosiery manufacture are "artificers"; (2) all masters, foremen, managers, clerks, contractors, sub-contractors, middlemen, and other persons engaged in the hiring, employment, or superintendence of the labour of any such artificers are "employers"; (3) any money or other thing had or contracted to be paid, delivered, or given as recompense for any labour is the "wages" of such labour; and (4) any agreement, understanding, etc., on the subject of wages, whether oral or written, direct or indirect, to which the employer and artificers are parties or are assenting, or by which they are mutually bound to each other, or whereby either of them has endeavoured to impose an obligation on the other, is a contract (s. 7).

Hospitals.—Hospitals are eleemosynary institutions designed for the benefit of poor and indigent persons. In law the term "hospital" includes both hospitals, popularly so called, and colleges. In *Philips* v. *Bury*, 1788, 2 T. R. 346, Holt, C.J., said (p. 353): "There is no manner of difference between a college and an hospital, except only in degree; an hospital is for those that are poor and mean and lowly and sickly; a college is for another sort of indigent persons, but it hath another intent, to study in, and breed up persons in the world, that have not otherwise to live: but still it is as much within the reason of hospitals." This article, however, will be confined to hospitals in the popular sense, that is, institutions for the reception and treatment of the sick and infirm. For colleges, see titles COLLEGE; CHARITIES.

Prior to the Reformation, hospitals were under the care of the clergy; and at the Reformation certain monastic and church property was set apart for the use of the sick. Instances of such dedication occur in the case of several of the London hospitals, *e.g.* St. Bartholomew's. In the reign of Elizabeth such institutions were much favoured. By 14 Eliz. c. 14 gifts to hospitals were rendered valid notwithstanding any misnomer, and by 39 Eliz. c. 5 persons seised of estates in fee-simple were enabled at any time within twenty years after the passing of the Act, by deed enrolled, to erect, found, and establish hospitals, which, however, must be endowed with lands, etc., of the yearly value of £10 at least, such hospitals to be incorporated and have power to purchase and hold lands of the yearly value of £200, and be governed in the manner prescribed by the founder. Leases might be granted of the lands belonging to the hospitals for any term not exceeding twenty-one years, but their alienation was prohibited. This statute was made perpetual by 21 Jac. I. c. 1, and is still in force.

Hospitals may be divided into those which are, and those which are not, rate supported.

In the first class fall those under the control of the poor law authorities, viz. those attached to many workhouses, and the asylums under the control of the Metropolitan Asylums Board (see ASYLUMS BOARDS); likewise included in this class are public lunatic asylums (see ASYLUMS), hospitals provided under the Public Health Act, 1875, s. 131, under the Public Health (London) Act, 1891, s. 75, and under the Isolation Hospitals Act, 1893. In most of these cases the authorities are empowered either to provide hospital accommodation themselves or to contract with existing public hospitals for the reception of patients. Within the metropolis, for example, guardians may, with the consent of the Local Government Board, so contract with hospitals (Metropolitan Poor Amendment Act, 1869, s. 16), and guardians generally are empowered, with the like consent, to subscribe towards the support and maintenance of such hospitals (Poor Law Act, 1879, s. 10). Similarly, under the Public Health Act, 1875, s. 131, and the Public Health (London) Act, 1891, s. 75, the same discretionary power is given. The case of isolation hospitals is the subject of special legislation. By the Isolation Hospitals Act, 1893, power is conferred on county councils, on the application of any of the local authorities mentioned in the Act, or on the requisition of any number of ratepayers not less than twenty-five, and after holding a local inquiry, if thought fit, to provide isolation hospitals for the reception and treatment of persons suffering from infectious diseases. Such hospitals are managed by hospital committees appointed by the county councils, and these committees are empowered to provide ambulances and make arrangements for the training of nurses, etc. The expenses of

these hospitals are defrayed out of the rates so far as not covered by the sums paid by patients or recovered from guardians in respect of pauper patients.

Hospitals not supported by rates may be kept up either by endowments (see CHARITIES) or by subscriptions. Being like other private institutions governed by their own rules, little need be said of them here, except in the case of lying-in hospitals, which are the subject of special legislation, their institution and regulation being governed by 13 Geo. II. c. 82, which provides that before such a hospital can be established a licence must be obtained in that behalf from justices sitting in general Quarter Sessions (s. 1). The governors or masters of such hospitals before admitting any woman as a patient are required to take her before a justice, who is to examine her on oath as to whether she is married or single (s. 10), unless she can produce an affidavit showing this (s. 11). Notice is to be given of the birth of every bastard child in such hospitals to the overseers or churchwardens at least four days before the mother is discharged, and such overseers or churchwardens are required to attend at the hospital and have the woman examined by a justice as to her last settlement (s. 12).

The Foundling Hospital, London, was incorporated by royal charter in 1739 "for the maintenance and education of exposed and deserted young children." The powers conferred by the charter were confirmed and amplified by the statute passed in the following year, 13 Geo. II. c. 29, which enlarged the powers of management and provided for the employment of children educated in the institution (see *Ency. Britt.*, 9th ed., *s.v.* "Foundling Hospitals").

Nuisance created by Hospitals, etc.—The fact that the erection of a hospital by a public authority is authorised by statute affords no protection to the authority erecting the same if a nuisance is thereby created (*Metropolitan Asylum District* v. *Hill*, 1881, 6 App. Cas. 193). In *Tod-Heatly* v. *Benham*, 1888, 40 Ch. D. 80, the use of premises as a hospital for the treatment of out-patients suffering from skin diseases was restrained as a breach of a covenant against carrying on certain trades or doing any act "which shall or may be or grow to the annoyance, nuisance, grievance, or damage of the lessor, his heirs or assigns, or the inhabitants of the neighbouring or adjoining houses." It was there decided that it was sufficient in order to obtain an injunction to show that sensible people felt a reasonable apprehension of risk and interference with the enjoyment of their houses, without proving actual risk of infection. A hospital is a "business" within the terms of a covenant not to use the demised premises for any business, where patients pay according to their means (*Bramwell* v. *Lacy*, 1879, 10 Ch. D. 691).

Liability of Hospital Authorities for Treatment of Patients.—Patients are bound while they remain in a hospital to submit to the rules thereof, and they are entitled to be treated with reasonable skill. They can therefore maintain an action against a surgeon or medical practitioner for not using such a degree of skill, but whether they have in like circumstances a right to maintain an action against the hospital authorities has not been decided in England, although it has been held in the United States and in New Zealand that they cannot (see Beven, *Negligence in Law*, 2nd ed., vol. ii. pp. 1406 *et seq.*). In a recent case in Ireland (*Dunbar* v. *Ardee Union*, [1897] 2 Ir. R. 76) it was decided that poor law guardians were not answerable in damages in their corporate capacity for injuries caused by the negligence of their officials in the treatment of pauper patients in workhouse hospitals, and the principle of this case would seem to be

applicable to all hospital authorities, at all events those provided under statutory authority.

Exemptions of Hospitals.—Unless wholly self-supporting, hospitals are exempt from property tax and inhabited house duty. Receipts for donations or subscriptions to hospitals are allowed by the Inland Revenue authorities to be given unstamped. Hospitals, however, have no general exemption from the payment of rates (*St. Thomas' Hospital* v. *Stratton*, 1875, L. R. 7 H. L. 497).

[*Authorities.*—Bristowe, *Legal Handbook for Hospital Authorities*; Beven on *Negligence in Law*, 2nd ed.]

Hostage.—See War.

Hotchpot (French, *hochepot*; cp. Old Dutch, *hutspot* (Skeat)).—"It seemeth that this word is in English a pudding, for in a pudding is not commonly one thing alone, but one thing with other things together" (Littleton, *Ten.* s. 267).

By what Blackstone calls "a housewifely metaphor," the term is used in law to signify the mingling of property in certain cases, in which a person claiming to share in a common fund is bound, as a condition of so doing, to bring into the fund other property deemed in law to have been previously advanced to him in anticipation of his final share in the fund. Hotchpot resembles in principle, and is probably related in origin to the *Collatio Bonorum* of Roman law (*Dig.* 37. 6, and 5. 2. 25 pr.: *Codex*, 6. 20). The following different cases of hotchpot are known to English law.

1. *At Common Law.*—"Where one of several coparceners has had an estate given unto her in frankmarriage (see Frankmarriage) by her ancestor, . . . in this case, if lands descend from the same ancestor to her and her sisters in fee-simple, she or her heirs shall have no share in them unless they will agree to divide the lands so given in frankmarriage in equal proportions with the rest of the lands so descending" (Black. *Com.*, 2nd ed., 190). This principle (*maritagium cadit in partem*) is referred to in Bracton and in Britton, and is stated by Littleton (*Ten.* s. 271) to have existed "at common law before the Statute of Westminster ii." It only applied subject to these conditions: (*a*) The lands must be fee-simple, devolving on coparceners from a common ancestor; (*b*) the settlement must be by the ancestor and in frankmarriage; (*c*) hotchpot was not compulsory, but a condition of inheriting as coparcener (Littleton, s. 273; but see Britton, iii. 8. 8). This form of hotchpot has become obsolete in practice, but still exists in theory, since, the requisite conditions being fulfilled, gifts of frankmarriage are still perfectly valid.

2. *By Local Custom.*—In three cases, associated with the writ *de rationabili parte bonorum*—(1) in the province of York (excepting the diocese of Chester), (2) in the city of London, and (3) in some parts of Wales.

As regards Wales, there is no authority beyond the reference in 7 & 8 Will. III. c. 38. As regards York and London, the customs were expressly saved by the Statute of Distributions (s. 4), but, together with like customs "in certain other parts," were finally abolished by 19 & 20 Vict. c. 94. By the original customs, a father could only dispose by will of part of his personalty ("the dead man's part"), the rest ("the orphanage part") being reserved to his children by way of legitim. The testamentary restriction was abolished by 4 & 5 Will. & Mary, c. 2

(York), and 11 Geo. I. c. 18 (London), but the customary succession to the orphanage part remained. A child claiming to share in the latter had to bring into hotchpot any advancement previously received from the father. The customs only applied to legal intestacies (*Wilkinson* v. *Atkinson*, 1823, 1 Turn. & R. 257). "Advancement" had practically its present meaning. It was confined to personalty by the London custom, but by the York custom it extended to realty, and indeed the heir at common law (but not by borough-English) was altogether excluded from sharing in the orphanage part. It was doubtful whether if an advancement exceeded the child's share in the orphanage part, the excess had to be brought into hotchpot with the dead man's part (Toller, p. 398).

3. *By the Statute of Distributions*, sec. 5, it is enacted that, "in case any child other than the heir-at-law, who shall have any estate by settlement from the said intestate, or shall be advanced by the said intestate in his lifetime by portion not equal to his share which will be due to the other children by such distribution as aforesaid, then so much of the surplusage of the estate of such intestate, to be distributed to such child or children as shall have any land by settlement from the intestate or were advanced in the lifetime of the intestate, as shall make the estate of all the said children to be equal as near as can be estimated; but the heir-at-law, notwithstanding any land that he shall have by descent or otherwise from the intestate is to have an equal part in the distribution with the rest of the children without any consideration of the value of the land which he hath by descent or otherwise from the intestate."

According to Lord Raymond (2 P. Wms. 443), the provision is grounded on "the most just rule, equality, equity"; and Lord Kenyon (2 P. Wms. 357) says that it was adopted from the custom of London. The following are the chief points to be noted:—(*a*) There must (*semble*) be an actual legal intestacy (*Walton* v. *Walton*, 1807, 14 Ves. 324; but consider *Harte* v. *Meredith*, 1884, 13 L. R. Ir. 341, and *Stewart* v. *Stewart*, 1880, 15 Ch. D. 543); (*b*) the persons advanced must be children, or else remoter issue taking by representation; (*c*) the hotchpot is only in favour of other children, not of the widow (*Kirkudbright* v. *Kirkudbright*, 1802, 8 Ves. 51); (*d*) the "advancement" must consist either of an interest in land "by settlement from the intestate" or of a portion (see PORTION) of personalty of *considerable* amount (not mere trivial presents) paid to "establish the child in life or to make a provision for him" (Jessel, M. R., in *Taylor* v. *Taylor*, 1875, L. R. 20 Eq. 155), and not merely to meet current expenses of maintenance or education (Bac. *Abr.* "Exors." K.). This includes contingent benefits if the contingency has happened, or in any case if capable of valuation and so limited as to happen within a reasonable time. An advancement by marriage settlement must be estimated on the whole fund settled (*Weyland* v. *Weyland*, 1742, 2 Atk. 635). (*e*) The advancement must be made by a *complete* divesting act of the *father* (*Holt* v. *Frederick*, 1726, 2 P. Wms. 357) *in his lifetime* and otherwise than by will. It need not, however, take effect during the father's lifetime (*Edwards* v. *Freeman*, 1727, 2 P. Wms. pp. 435, 440, and 446). (*f*) "It is left to the election of the child whether he will collate or not" (*ibid.* p. 449); (*g*) the heir-at-law need not bring into hotchpot land coming to him "by descent or otherwise from the intestate," although he is accountable for advancements of personalty (*Phiney* v. *Phiney*, 1708, 2 Vern. 638). This extends to heirs in borough-English (*Lutwyche* v. *Lutwyche*, 1735, Ca. *temp.* Talbot, 279) and to coparceners (Burn, *Eccl. Law*, iv. 532).

4. *By Express Direction.* — A "hotchpot clause" expressly directing

property under certain circumstances to be brought into hotchpot as a condition of sharing in a settled fund, is commonly inserted by conveyancers in settlements and wills. There are three chief classes of cases in which this is done, *i.e.* (1) to bring shares appointed under a special power of appointment or portioning into hotchpot with the unappointed fund — this is a "usual" clause (*Alloway* v. *Alloway*, 1843, 4 Dr. & War. 380); (2) in direct gifts to a class, some of whom may have received advancements by way of portions (cp. *Stewart* v. *Stewart*, 1880, 15 Ch. D. 539; *In re Cosier*, [1897] 1 Ch. 325); (3) in similar cases to the last, but where the advancements have been from extraneous sources, and not by way of portions (cp. *Stares* v. *Penton*, 1867, L. R. 4 Eq. 40; *Middleton* v. *Windross*, 1873, L. R. 16 Eq. 212).

5. *In Equity.*—Co-sureties claiming contribution "must bring into hotchpot every benefit received" (*Steel* v. *Dixon*, 1881, 17 Ch. D. 825; *In re Arcedeckne*, 1883, 24 Ch. D. 709; *Berridge* v. *Berridge*, 1890, 44 Ch. D. 168).

[*Authorities.*—(1) Bracton, *De Leg.* ff. 22, 77, and 428 *b*, Britton, iii. 8. 8; Littleton, *Tenures*, secs. 266–275, and Coke's *Commentary*, *ibid.*; Cowell's *Interpreter*, art. "Hotchpot"; *Termes de la Ley*, *id.*; Black. *Com.*, 2nd ed., pp. 190 *et seq.* (2) Toller, *Exors.* bk. iii. ch. 6; Burn's *Eccl. Law*, 9th ed., iv. pp. 564 *et seq.* (3) Toller, *id.* ch. 6; Williams' *Exors.*, Pt. III. bk. iv. ch. 1, s. 3; the judgments in *Edwards* v. *Freeman*, 2 P. Wms. 435. (4) Farwell on *Powers*, ch. viii.; Vaizey on *Settlements*, ch. xiii. sec. 18; and for precedents of forms, see Bythewood and Jarman, vols. vi. and vii.; Key and Elphinstone, vol. ii.; Davidson, vols. i. and iv.; vol. iii., *Precedents*, etc.; Prideaux, vol. ii.; Vaizey on *Settlements*. (5) De Colyar on *Guarantees*, p. 361.]

Hotel.—See Inn; Innkeeper. Large hotels come within the definition of public buildings in the London Building Act, 1894 (57 & 58 Vict. c. ccxiii. s. 5 (27)); and see *London County Council* v. *Rowton*, 1897, 14 T. L. R. 113, and London (County) *Buildings*.

Hour.—See Time.

House Agent.—See Estate and House Agent.

Housebote.—See Estovers.

Housebreaking.—See Burglary.

House Duty.—See House Tax.

Householder.—See Compound Householder; Franchise (Electoral).

House of Commons.—This article deals solely with the procedure and privileges of the House. For qualifications for membership

and for the right to vote at a parliamentary election, see PARLIAMENT; FRANCHISE (ELECTORAL).

The House of Commons consists of 670 members, of whom 495 are returned by England and Wales, 72 by Scotland, 103 by Ireland. The number was increased from 658 to 670 by 48 & 49 Vict. c. 23.

(i.) OFFICERS OF THE HOUSE.—*The Speaker.*—When a new Parliament meets, the Commons are summoned to the bar of the House of Lords, and are told that before being informed of the causes of Her Majesty calling the Parliament, members of both Houses must be sworn and a Speaker chosen. The Speaker, when chosen, proceeds usually on the following day to the bar of the Lords' House, accompanied by members of the House of Commons, announces his election, and submits himself to Her Majesty's approbation. When approved, he claims the privileges of the Commons (see *infra*). These granted, the Speaker and the Commons return to the House and take the oath or make affirmation. (See OATH, PARLIAMENTARY.)

For the position and duties of the Speaker, see SPEAKER.

Deputy Speaker.—If health or other causes prevent the Speaker from discharging the duties of his office, a Deputy Speaker may take his place, and his acts are made valid by 18 & 19 Vict. c. 81.

Chairman of Ways and Means.—When the House goes into Committee the Speaker leaves the chair, and the Chairman of Ways and Means presides. Though nominally Chairman of the Committee of Ways and Means, this officer, who is a member of the House chosen at the commencement of each Parliament, presides over all committees of the whole House. In his absence his place is taken by a deputy, from a panel of five members chosen for that purpose by the Speaker (*Com. Journ.* 151, p. 47).

Clerk of the House.—Technically, "under clerk of the Parliaments in attendance on the Commons" is appointed for life by letters patent. He records the proceedings and signs the orders of the House, and indorses bills to be sent to the Lords. His two assistants are appointed by the Crown on the nomination of the Speaker, and are removable on address of the House. He is responsible for the Journals of the House, which are made up from the votes and proceedings printed for the use of members every day, after being first passed by Mr. Speaker. They record business transacted, not speeches made. Whether they are records in the judicial sense of the word has been doubted, but may probably be decided in the negative (Anson, *Parliament*, 174).

Serjeant-at-Arms.—Appointed by the Crown by letters patent to attend on Her Majesty when there is no Parliament, and on the Speaker when a Parliament is sitting. He attends the Speaker with the mace, and is the officer of the House to keep order within and to execute the Speaker's warrants outside.

(ii.) PROCEDURE OF THE HOUSE.—The course of business of the House is regulated by its own orders, recorded in the Journals. These orders are of three kinds—

Standing Orders, which are permanent and cannot be altered, nor, except for special reasons, suspended, without due notice;

Sessional Orders, renewed at the commencement of every session at the pleasure of the House;

Resolutions, which though not passed for any specified time nor declared to be Standing Orders, are in many cases observed as customary rules. May, pp. 145 and 164, gives illustrations of resolutions which are and of resolutions which are not permanent.

Daily Business.—The hours of meeting are regulated by the Standing

Orders (May, *Parl. Pract.* 823, Appendix). The House meets at 3 p.m. on every week-day, except Wednesday, when it meets at noon, and Saturday, when it does not meet except by special order. Forty members must be present before the Speaker can take the chair. If forty have not assembled before 4 p.m., the House is adjourned until the next day of sitting. The order of business (see STANDING ORDERS; May, 225; Anson, 245) is as follows:—(1) *Private business* (see PRIVATE BILL LEGISLATION). (2) *Public petitions* (see PETITIONS). (3) *Notices of motion, i.e.* announcements by members of an intention to propose a question to the House (for the form of doing this and the mode in which priority is secured, see May, 228). (4) *Unopposed returns, i.e.* motions for accounts or papers to be supplied to the House. (5) *Motions for leave of absence.* A member is supposed to be always present when the House is sitting. If, therefore, he wishes to be absent for some time he must obtain leave (Anson, *Parliament*, 247). (6) *Questions.* These may be addressed, after notice, to ministers, concerning the business of their departments, or to members, concerning business of the House on which they may be engaged. The Speaker can rule out or modify a question, or the person to whom it is addressed may refuse to answer it (May, 236). (7) *Orders of the day.* These are matters which the House has ordered to be discussed on a given day. They may be preceded by motions respecting the business of the House which Government thinks it necessary to introduce. The orders of the day on Monday and Thursday are such as it may please the Government to set down, and on Friday the first order is the Committee of Supply or Ways and Means. The Government may, and generally does, by a vote of the House, acquire command of much of the time which would otherwise fall to motions introduced by private members.

Every matter determined by the House is presented for determination in the form of a question. An assent to the question is either an order or a resolution. An order is a substantive direction; a resolution is an expression of intention or of opinion.

When a proposal for legislation is presented to the House it takes the form of a *bill*. Since the reign of Henry VI. the bill has contained the law which the Commons want in the form in which they want it. At an earlier date it merely contained a petition for legislation (Anson, *Parliament*, 239). Only Public bills are here dealt with. Money bills will follow. Private bills and provisional orders are dealt with under their respective headings. The stages are these: *Notice* is given (*vide supra*), and on the day fixed, at the commencement of public business, *leave is asked* to introduce the bill. This is given, usually, though not always, without discussion. The bill is then *presented* at the bar of the House by the mover, who, when called up by the Speaker, delivers the bill to the clerk at the table. The question that the bill be *now read a first time* is put without amendment or debate.

An order is then made for the *second reading* on a day named, and at that stage the principle of the bill is discussed. The second reading may be opposed (1) by a simple negative; (2) by moving the previous question—both these methods, if successful, would still leave the bill on the notice paper and capable of being revived later in the session; (3) by a motion that the bill be read a second time that day six months, or at some date when Parliament is sure not to be sitting; (4) by moving its rejection, a method not now resorted to; (5) by moving, as an amendment to the question that the bill be read a second time, a resolution declaring some principle adverse to the bill.

If the bill is, on question put, read a second time, there follows the

question "that this bill *be committed.*" This is merely consequential and may not be opposed.

Before the House goes into Committee for the first time on the bill, it is open to move to give *Instructions* to the Committee, which may enable provisions to be introduced not strictly relevant, and so not capable of being introduced by amendment (May, 453, 839; Hansard, 4, series xii. 205). This settled, the House resolves itself into Committee, the Speaker puts the question "that I do leave the chair," and the Chairman of Committees presides. The bill is discussed clause by clause, members may speak more than once to the same question, and amendments are made, and after all the clauses are considered, new clauses may be proposed. (For the form of amendments and rules respecting them, see May, 276, 457.) At the end of each sitting the Chairman is instructed to report progress and ask leave to sit again. When the bill has been fully considered, the Chairman is instructed "to report the bill, with amendments, to the House."

If the bill has been amended in Committee, the *Report* of the bill is considered by the House, further amendments may be made and new clauses added. The bill may be recommitted and reported again. When no amendments are made in Committee, or when the report of an amended bill has been considered, the bill is usually read a third time at once and ordered to be sent up to the House of Lords, with the words indorsed "soit baillè aux seigneurs." The bill is taken to the House of Lords by the clerk. If the Lords amend the bill it is returned, but not otherwise. When it comes back amended a day is fixed for considering the Lords' amendments. Whether these are agreed to or not, the bill is returned with a corresponding message. If the Houses disagree, there are various modes in which an agreement may be effected (Anson, 258; May, 479).

Committees.—For the purposes of the *public* business of the House there are Committees of three sorts—Committees of the whole House, Standing Committees, Select Committees.

(*a*) *Committees of the whole House* are appointed by resolutions that the House will, at a time fixed, resolve itself into Committee for a particular purpose. Such are the Committees appointed to consider the details of a bill. Grants of supply to the Crown and the provision for that supply must originate in resolutions passed in Committee; and the House therefore sets up two Committees, of Supply and of Ways and Means, at the commencement of every session, so soon as it has agreed to an address in answer to the Speech from the Throne (see PARLIAMENT). The Committee of Supply deals with motions made by ministers of the Crown that sums specified should be granted to the Crown. The Committee of Ways and Means votes money from the proceeds of taxation which have passed into the Consolidated Fund, receives the financial statement or Budget from the Chancellor of the Exchequer, and considers all proposals for taxation which are directed to an immediate source of revenue (May, 557). Resolutions passed in Committee of Supply are reported to the House, when amendments may be moved in reduction of the proposed grant. Subject to this the House agrees with the resolution of the Committee, and the matter is at an end. The resolutions of the Committee of Ways and Means are first submitted to the House for its agreement, and then form the subject of a bill which empowers the Treasury to obtain from the Consolidated Fund the money voted in Committee of Supply for the services of the year. These bills are subsequently embodied in the Appropriation Bill which enacts the application of each

grant voted during the session to the service for which it was voted in Committee of Supply.

The old rule that "grievances precede supply," by which any topic might be discussed as an amendment to the question put, that "Mr. Speaker do now leave the chair," is practically superseded by a Standing Order of 1882, and a Sessional Order of 1896, renewed in 1897 (Anson, *Parliament*, 271). (For the procedure of these Committees generally, see May, ch. xxii.)

The Commons claim an exclusive right to deal with grants of money to the Crown, and with the imposition of charges on the subject, and do not admit the right of the Lords to amend bills relating to these subjects (May, 543).

(*b*) *Standing Committees*, for public business, are two, appointed for each session, to consider bills relating to law and legal procedure, to trade and shipping. These Committees consist of not less than sixty or more than eighty members. For this procedure, see Standing Orders, 46–50.

(*c*) *Select Committees* are appointed to conduct an inquiry, or to consider the provisions of a bill, and to report to the House; unless by leave of the House they are not to consist of more than fifteen (see Standing Orders, 66–76; and May, 378–399).

(iii.) Privileges.—Certain privileges of the House are demanded and granted at the commencement of every Parliament by the Speaker. These are (1) that their persons may be free from arrest. This privilege formerly extended to the estates and the servants of members. The first ceased to be demanded in 1857, the second in 1892. This privilege has been narrowed by successive statutes to personal freedom from arrest during and for forty days before and after a session of Parliament (*Duncombe's* case, 1847, 1 Ex. Rep. 430).

(2) Freedom of speech. This right, which was directly infringed by the Tudors and Stuarts and indirectly by George III., has been long undisputed. It affects the presence of strangers who may be ordered to withdraw by the Speaker or Chairman, or by vote, on motion of a member, taken without debate or amendment (Hansard, 3rd series, 224, p. 55). It also makes the publication of debates depend on the goodwill of the House.

(3) Freedom of access to the Sovereign. This is enjoyed by the House collectively if it desires to present an address to the Queen.

(4) That the best construction may be placed on their proceedings.

But there are important customary privileges which the Speaker does not demand.

One of these is the right to insist that every constituency is represented, and that persons disqualified for membership do not sit and vote. Thus the Speaker has power, by order of the House in session, and by statute in certain cases out of session, to direct the clerk of the Crown in Chancery, by his warrant, to issue a writ to fill a seat which has fallen vacant. And the House, although it has ceased to determine the rights of the parties in controverted elections, will declare a seat to be vacant if an unqualified person has been returned and no petition presented (May, 618).

The House can also protect its character by the expulsion of members who have shown themselves unworthy, though it cannot prevent their re-election (May, 55; Anson, 167).

It may also assert its dignity by inflicting punishment for disrespect, either to individual members of the House as such, or to the House collectively; and it may do this by reprimand, by fine, or by imprison-

ment, employing the serjeant-at-arms to bring the offender into its presence (May, ch. iii.; Anson, 172).

The exercise of these rights has from time to time brought the House into collision with the Courts of law, and the House has claimed to define the extent of its privileges by resolution. The leading cases are *Ashby* v. *White*, 1704, 1 Smith, *L. C.* 254; *Stockdale* v. *Hansard*, 1839, 9 Ad. & E. 203; *Bradlaugh* v. *Gossett*, 1883, 10 Q. B. D. 281.

The result seems to establish two principles—

(1) That while Courts of law will not interfere with any questions of right exercisable within the House itself or concerning the procedure of the House, they will not allow a claim of privilege to hinder them from discussing rights exercisable outside the House and independent of it (*Stockdale* v. *Hansard*, 1839, 9 Ad. & E. 203; *Bradlaugh* v. *Gossett*, 1883, 10 Q. B. D. 281).

(2) That where a man is committed to prison for contempt of the House and on the return to a writ of Habeas Corpus such contempt is alleged as the cause of commitment, a Court of law will accept such a return without further inquiry, though if a cause were alleged manifestly arbitrary and unjust, a Court might deal with the matter "as justice might require" (*Burdett* v. *Abbott*, 1811, 14 East, 150; 12 R. R. 450; and see *Patey's* case, 2 Raym. (Ld.) 1105).

[*Authorities.*—The books referred to are May, *Parliamentary Practice*, 10th ed., and Anson, *Law and Custom of the Constitution*, i. "Parliament," 3rd ed.]

House of Correction.—See CORRECTION, HOUSE OF.

House of Lords.—The House of Lords, as at present existing, is composed of members who sit in virtue of various qualifications—some because a remote ancestor was summoned to Parliament by the Sovereign and sat in obedience to the summons, others by reason of letters patent to themselves or to one of their ancestors, others again by force of particular statutes.

The foundation of the House of Lords lies in the baronage of England. In the earliest days after the Conquest persons holding of the king by barony were peers of the king's court (*Curia Regis*), the expression "Peer of the Realm" or "Peer of the Land" not apparently having been in use in England before the year 1322. It was also in the king's power to summon experts to his court for certain purposes, chief among whom, as the various Courts of Justice became separately established, were the judges.

The word "Parliament" appears to have been first adopted in England, in relation to English affairs, in the third year of the reign of Edward I. (Westm. 1, Preamble), after which time there is frequent mention of the King in his Council in his Parliament, which was the equivalent of the earlier Common Council of the Realm.

Apart from the council, the persons who received individual summonses to attend Parliament were usually the archbishops, the bishops, the earls, some of the abbots and priors, and some of the laymen commonly described as barons.

In the later years of the reign of Edward III. and the earlier years of the reign of Richard II. the number of barons to be summoned became approximately fixed, and the heir male or the husband of the heir female commonly took the place of the ancestor.

The archbishops and bishops, as well as the abbots, priors, and lay barons who attended Parliament, were all called peers of the realm, and in the reign of Richard II. the spiritual lords of Parliament asserted their claim to be peers on the sole ground that they held of the king by barony (3 *Rot. Parl.* 236, 237).

Earls, though originally officers having a certain territorial jurisdiction (and that even before the Conquest), had been created by charter or letters patent, with descent of inheritance, as early as the reign of Stephen, but Richard II. was the first to create a baron in the same way (Pat. 11, Rich. II. p. 1, m. 12); and in the end it became usual to create barons as well as other peers by patent. A peer of England so created before the union with Scotland, a peer of Great Britain so created before the union with Ireland, and a peer of the United Kingdom so created since the union with Ireland, has always had a dignity capable of devolution, only in accordance with the terms of the limitation in the patent itself.

The succession to a barony not created by letters patent depends on a different principle. When in process of time it was forgotten that a man holding by barony was liable to a summons to Parliament, as one of his feudal burdens, and the summons came to be regarded as a privilege and an honour, the doctrine grew up that when a man is summoned and sits in Parliament "thereby his blood is ennobled to him and his heirs lineal, and thereupon a baron is called a Peer of Parliament" (*Co. Litt.* 16 *b*). Out of this in later times (as heirs lineal include females) grew the doctrine of abeyance. See BARONY.

Spiritual lords in the end ceased to be recognised as peers, partly because in cases of life and death they always retired before a vote was given in the House of Lords, partly because on this account not one of them was ever summoned to the Court of the Lord High Steward, partly because not one of them was ever tried by the peers on indictment for treason or felony, and finally in consequence of a resolution of the House of Lords itself that they are only lords of Parliament and not peers (S. O., H. L. "Privilege," numbered at different periods 44, 79, and lastly 73). The abbots and priors disappeared with the dissolution of the monasteries.

The summons of the archbishops and bishops is now regulated by statute, and the number of lords spiritual in the House of Lords cannot exceed twenty-six. When a vacancy occurs in any See except those of Canterbury, York, London, Durham, or Winchester, the bishop appointed to the vacant See is not immediately entitled to a writ of summons, unless he has been translated and was actually sitting as a lord of Parliament at the date of translation (the Bishoprics Act, 1878, s. 5). Owing to foundations or reconstitutions of bishopries since the year 1847 there are now (including the newly appointed Bishop of Bristol) eight bishops without seats, and waiting their turn for a writ of summons according to seniority (the Ecclesiastical Commissioners Act, 1847, s. 2; the Bishopric of St. Alban's Act, 1875, s. 7; the Bishopric of Truro Act, 1876, s. 5; the Bishoprics Act, 1878, s. 5; the Bishopric of Bristol Act, 1884, s. 2).

An archbishop or bishop may resign, and in that case his See may be declared vacant and the vacancy filled up as if he were dead. If it be duly certified that an archbishop or bishop is incapacitated by mental infirmity, a coadjutor may be appointed, in which case the coadjutor bishop does not acquire any title to sit in the House of Lords (Bishops Resignation Act, 1869).

By statute (Appellate Jurisdiction Act, 1876, ss. 6, 14) every Lord of Appeal in Ordinary (the number being limited to four) became entitled to

a seat in the House during his tenure of office, and afterwards (Appellate Jurisdiction Act, 1887, s, 2) for life, with the rank of baron. His patent is not in the same form as that of a baron created in the ordinary manner. He is not "created," but only "nominated and appointed to be a Lord of Appeal in Ordinary by the style of Baron" (*nominatim*). The clause rendering investiture unnecessary (and with it the word "ennobling") is omitted (Pat. 54, Vict. p. 5, m. 1).

By the Union with Scotland every peer of Scotland became a peer of Great Britain, but only sixteen peers of Scotland could sit in the House of Lords, and those sixteen only for the space of one Parliament, unless re-elected (the Union with Scotland Act, 1706, s. 1, arts. 22 and 23). The Union of Great Britain with Ireland, again, had the effect of bringing into existence in the United Kingdom a class of peers who are not members of the House of Lords. The principle of election was followed as in the case of Scotland. The peers of Ireland became peers of the United Kingdom, the lords temporal of Ireland electing twenty-eight representatives to sit in the House of Lords, not for a single Parliament, but for their respective lives (the Union with Ireland Act, 1800, s. 1, art. 4). Under certain restrictions which prevent the total number in existence from exceeding one hundred, the Crown may create new peers of Ireland, but not new peers of Scotland; and under certain restrictions a peer of Ireland, but not a peer of Scotland, may be elected and sit in the House of Commons as a member for any constituency in Great Britain.

A member of the House of Lords cannot sit in the House of Commons. The fact of succession to a peerage of England, or of Great Britain, or of the United Kingdom, disables the person so succeeding from being elected to or from sitting or voting in the House of Commons. "When a member" of the House of Commons "has succeeded to a peerage entitling him to a seat in the House of Lords, and delays or refuses to apply for a writ of summons, the House of Commons is entitled, and may, in the interest of the constituency, be bound to ascertain the fact of the succession" (First Report from Select Committee on H. C., Vacating of Seats, 1895, No. 272).

The legislative power formerly centred in the *Curia Regis*, in the king and his baronage, or in the common council of the realm (which did not include the Commons) has by degrees fallen into the hands of Parliament in the modern sense of the term. See PARLIAMENT. At present the assent of the House of Lords as a whole (*i.e.* of a majority) is required before any bill can become law, but the separate assent of the lords spiritual as an estate of the realm is not required (Keilw. 184 *b*; Dy. 60; 2 Inst. 585; Stat. 12 Car. II. c. 1; 13 Car. II. st. 1, c. 7, passed in the absence of the spiritual lords). The vote of any member of the House is neither of greater nor of less value than that of any other—the votes of the archbishops, bishops, barons, and earls, of the viscounts, the first of whom was created by Henry VI. (Pat. 18, Hen. VI. p. 2, m. 21), of the marquesses, the first of whom was created by Richard II. (*Rot. Chart.* 9 & 10 Rich. II. m. 13), and of the dukes, the first of whom (Duke of Cornwall) was created by Edward III. (*Rot. Chart.* 11 Edw. III. No. 60), being all of equal weight; but precedence, or the placing of the lords, is regulated by the Statute 31 Hen. VIII. c. 10.

The power of initiating legislation, which in the early days of Parliaments was usually exercised by the Lords, or by the King and the Council, now belongs equally to Lords and Commons, with certain well-defined exceptions. Bills for restitution of honours or in blood are introduced into the House of

Lords by command of the Sovereign, and are sent to the Commons as having already the Sovereign's assent (instances in May's *Law and Usage of Parliament*, 435). Bills of ATTAINDER and BILLS OF PAINS AND PENALTIES have also usually been first introduced into the House of Lords. Since the resolutions of the Commons in the years 1671 and 1678 (9 C. J. 236, 509) the Lords appear to have acquiesced in the principle that a money bill is practically not to begin or be amended in their House, though not without a protest as to their "undoubted right" (13 L. J. 119).

Of the ancient judicature of the *Curia Regis*, or of the Common Council of the Realm, or of Parliament, or of the Council in Parliament, there remains comparatively little to the House of Lords. As to appeals, see APPEAL. The important jurisdiction in IMPEACHMENT is of later growth. The first case of impeachment in the technical sense of the term was in 1376 (2 *Rot. Parl.* 323). Either a peer or a commoner may be impeached before the Lords, as well for high treason as for other high crimes and misdemeanours (14 L. J. 260, 262–264). The Sovereign's pardon is not pleadable to an impeachment (Act of Settlement, s. 3), though it may be granted after sentence.

Every peer (except a peer of Ireland who is a member of the House of Commons) and every peeress (20 Hen. VI. c. 9), if indicted of treason or felony, or misprision of either, has a right to be tried in the House of Lords (the Court of our Lady the Queen in Parliament), or when Parliament is not sitting, in the Court of the Lord High Steward. In either case the Lord High Steward (who is appointed for the particular occasion) presides. In trials for treason or misprision of treason all peers who have a right to sit and vote in Parliament are to be summoned to attend, whether Parliament be sitting or not, and if they appear they are to vote (the Treason Act, 1695, s. 11, or Stat. Realm, s. 10). In trials of peers for felony it does not seem necessary that all the peers of Parliament should be summoned to attend in the Court of the Lord High Steward, as these trials are not mentioned in the Act of William III., and the earlier custom was to summon only a limited number (*Baga de Secretis*, cases, *temp.* Hen. VII. Hen. VIII. See also 14 L. J. 412, 418, and 15 L. J. 35).

Claims of peerages and of offices of honour have long been brought before the House of Lords, but not without express reference from the Crown (Hale, *Jurisdiction of the Lords' House*, 104). The claimant usually presents a petition to the Sovereign through the Secretary of State, and he refers it to the Attorney-General, whose report the Crown may, and commonly does, refer to the House of Lords (Hubback, *Evidence of Succession*, 84–88).

A certain jurisdiction in relation to the election of representative peers of Scotland, and to votes and claims to vote at the election, has been conferred upon the House by the Representative Peers (Scotland) Act, 1847, s. 2, and the Representative Peers (Scotland) Act, 1851, s. 4.

A similar jurisdiction in relation to the representative peers of Ireland was also given by the Union with Ireland Act, 1800, art. 4.

Matters of privilege affecting the House of Lords are decided by the House itself; and on this ground apparently it rejected the claim of Lord Wensleydale to take his seat as a peer for life, after the letters patent of creation had been referred to the Committee of Privileges (Macqueen, *Discussion and Judgment of the Lords on the Life Peerage Question*).

The House of Lords can always call, and has frequently called, for the assistance of the judges, especially in questions relating to the peerage. The privilege seems to be a relic of the days when judges were summoned and sat with the king in his council in his Parliament.

As to the privileges of Parliament in general, and the right to commit to

prison, see 14 East, 143, *Burdett* v. *Abbott*, and May's *Law and Usage of Parliament*, 61–92.

The Journals of the House of Lords as distinguished from the rolls of Parliament do not begin until the first year of the reign of Henry VIII. After that time they contain (though with some important omissions, as, *e.g.*, between April 22 and May 1, 1559) the proceedings of the House day by day, with a list (from and after February 6, 3 Hen. VIII.) of the members present. According to the custom of the House, lords who dissent from any resolution may have their protests entered on the Journals. (See also Rogers, *Complete Collection of the Protests of the Lords.*) At some earlier periods protests are found entered upon the rolls of Parliament.

Except privilege of the House, individual lords of Parliament have had no exclusive privileges since the union with Scotland. The peers of Scotland and of Ireland who have no seats in the House of Lords (except those peers of Ireland who have seats in the House of Commons) enjoy all the other privileges of peers of the United Kingdom by virtue of the respective Acts of Union.

According to a decision of the Court of Common Pleas, "a peer of Parliament has no right to vote in the election of members of the House of Commons" (L. R. 8 C. P. 245 *et seq.*). According to resolutions of the House of Commons no peer, whether a lord of Parliament or not, has any right to give his vote in such election except a peer of Ireland elected and not having declined to serve as a member for any county, city, or borough of Great Britain; and the interference of any peer or prelate, except a peer of Ireland who is a member of (or a candidate for election to) the House of Commons, is a high infringement of the liberties of the Commons (57 C. J. 34 and 376).

Minority is now, though it has not always been, a disqualification for sitting in the House of Lords (14 L. J. 10). Alienage is a disqualification for being a member of either House of Parliament; and under the Act of Settlement, s. 3 (the provisions of which do not seem to have been expressly repealed), neither denization nor naturalisation would remove it, except in the case of persons born of English parents. Persons born out of the British dominions, however, whose parents were not British subjects, but who have obtained certificates under the seventh section of the Naturalisation Act, 1870, now sit in Parliament. Conviction of treason or felony, followed by certain sentences, disqualifies until expiration of sentence or pardon (the Forfeiture Act, 1870, s. 2). Bankruptcy also disqualifies (Bankruptcy Disqualification Act, 1871, ss. 6, 7, 8; Bankruptcy Act, 1883, s. 32; Bankruptcy Act, 1890, s. 9). Exclusion by sentence of the House itself disqualifies until there has been a pardon by the Crown. A peer of Scotland cannot be elected a representative peer or vote at the election of the representative peers, if he has twice in any year been present at divine service in any episcopal place of worship in which prayers were not offered for the Sovereign and the Royal Family (the Scottish Episcopalians Relief Act, 1792, s. 12). Any member of the House of Lords voting or sitting during any debate without having made and subscribed the necessary oath is subject to a penalty of £500 (Parliamentary Oaths Act, 1866, s. 5).

The Lord Chancellor (or Lord Keeper), whether peer or commoner, is Speaker or Prolocutor of the House of Lords by prescription, but, if a commoner, cannot give a vote (31 Hen. VIII. c. 10, s. 8). For the practice when the Lord Chancellor or Keeper is absent, or when the Great Seal is in commission, see May's *Law and Usage of Parliament*, 184–186. When a Lord High Steward is appointed for a trial in the House of Lords, he is, according to precedent, chosen Speaker by the House for the days of trial (15 L. J. 196).

The number of lords who can sit in the House otherwise than in right of hereditary peerages is limited. The number of hereditary peers of the United Kingdom with seats in the House is capable of unlimited extension by the Crown. For this reason there is a great and increasing preponderance of the hereditary element in the House. When the last "Roll of the Lords" was published it included 580 names, out of which no less than 505 were those of persons having hereditary peerages (*Roll of the Lords Spiritual and Temporal in the Third Session of the Twenty-sixth Parliament of the United Kingdom*), and further additions have since been made.

Note.—In the references given above, "C. J." means Journals of the House of Commons, and "L. J." Journals of the House of Lords.

[*Authorities* (other than those cited in the text).—Anson, *Law and Custom of the Constitution* (Part I., 3rd ed.); Collins, *Proceedings on Claims concerning Baronies by Writ*; Cruise on *Dignities*; Lords' Committees' *Reports on the Dignity of a Peer*; Pike, *Constitutional History of the House of Lords*.]

House Tax.—*History.*—The duty on inhabited houses was first imposed in 1778 (18 Geo. III. c. 26), and may be described as one of the first attempts to tax personalty on an economic basis, having been suggested by Adam Smith in his *Wealth of Nations*, published in 1776, in which the window tax (established in 1696, and continued till 1851) was criticised as not being founded on an intelligible basis, and the rent or annual value of dwelling-houses was indicated as a much fairer and more equal basis of taxation. The tax was continued with various alterations in its amount, incidence, and as to the exemptions, until 1834 (4 & 5 Will. IV. c. 19), when it was abandoned for a period, but was re-established in 1851 (14 & 15 Vict. c. 36), and has been since then continuously collected.

Portions of the Acts of 1803 (43 Geo. III. c. 161), 1808 (48 Geo. III. c. 55), 1817 (57 Geo. III. c. 25), 1824 (5 Geo. IV. c. 44, s. 4), 1825 (6 Geo. IV. c. 7), and 1832 (2 & 3 Will. IV. c. 113), which were in a state of suspended animation from 1834 to 1851, were revived in 1851, and, subject to certain subsequent modifications, continue to apply to the duty (*Hoddinot* v. *Home and Colonial Stores*, [1896] 1 Q. B. 169, 173). They form a mosaic which sorely needs consolidation and simplification.

Nature and Incidence of the Tax.—The tax is limited to Great Britain, and is not collected in Ireland, and falls upon the legal occupier and not on the owner of the property in respect of which it is assessed. The year of charge is, in England, from April 6 to April 5; in Scotland, from May 24 (Whitsunday) to May 23 (1880, c. 19, s. 48 (2)).

The tax is payable on January 1; but if the taxable subject has been unoccupied during any part of the year, so much of the tax as is apportionable to any quarter during the whole of which the subject was vacant is discharged if the outgoing occupier gives proper notice (1808, c. 55, Sched. A, v., and 1825, c. 7, s. 2).

The term "occupier" for the purposes of this tax means the legal occupier. It does not include lodgers who are not tenants but licensees, nor servants whose possession is that of their master. Where a house is occupied by the servant of a corporation for the corporation, the corporation is the legal occupier (*Russell* v. *Town and County Bank Limited*, 1888, 13 App. Cas. 418; *Tennent* v. *Smith*, [1892] App. Cas. 150). And where a house is inhabited by servants of a public authority other than the Crown, on behalf of the authority, the legal occupier is the public authority (*Coomber*

v. *Berks Justices*, 1883, 9 App. Cas. 61). The test seems to be that where the occupation would give the service franchise only, the servant is not liable for the house tax (*Bent* v. *Roberts*, 1876, 1 Ex. D. 66).

The residences of the head master and assistant masters of a public school are not treated as part of the school for purposes of the tax, but as separate tenements occupied by the masters (*Clifton College* v. *Tompson*, [1896] 1 Q. B. 432; *Charterhouse School* v. *Gayler*, [1896] 1 Q. B. 436).

Taxable Subjects.—The properties in respect of which the tax is assessed are inhabited dwelling-houses of the annual value of £20 or upwards, including therewith every coachhouse, stable, brewhouse, washhouse, laundry, woodhouse, bakehouse, dairy, and all other offices, and all yards, courts, and curtilages, and gardens and pleasure grounds (not exceeding one acre) belonging to and occupied with the dwelling-house. It does not matter that they are severed from the house by a public way (*Smith* v. *Petrie*, 1892, 19 Rettie, 405). Market gardens and nursery grounds are not included (1851, c. 36, s. 3); but training stables are (*Lambton* v. *Kerr*, [1895] 2 Q. B. 233), as are hunt kennels (*Cheape* v. *Kinmont*, 1888, 16 Rettie, 144).

To make a dwelling-house inhabited someone must sleep on the premises (*Riley* v. *Read*, 1879, 4 Ex. D. 100). Where a dwelling-house is divided into different tenements which are distinct properties, *i.e.* in distinct ownerships, each is treated as an entire house (1808, c. 55, Sched. B, r. xiv.; *A.-G.* v. *Mutual Tontine Chambers Association*, 1876, 1 Ex. D. 469).

This provision appears to contemplate structural divisions as well as distinct ownership, but the cases on structural division turn on the provisions of the Act of 1878 (c. 15, s. 13); and in *Hoddinot* v. *Home and Colonial Stores*, [1896] 1 Q. B. 169, 175, it is suggested that it is immaterial whether the division must be by builders' work or carpenters' work, *i.e.* by partitioning off or screwing up doors.

Where a dwelling-house is let in different storeys, tenements, lodgings, or landings, and is inhabited by two or more persons or families, it is charged as one house, but the landlord is treated as occupier (see *Walsingham* v. *Styles*, 1894, 3 Tax Cas. 247). This must be read subject to the exemption as to certain working-class dwellings, and the reduction of duty for registered lodging houses, *infra*. Where the owner does not live in the district where the house is, and does not pay the tax within twenty days of its falling due, it may be collected from the actual occupiers and deducted by them from next payment of their rent (1808, c. 55, Sched. B, vi.).

When the house, though one property, is structurally divided into and let as separate tenements, whether by one or more contracts, those which are unoccupied or are occupied solely for the purpose of a trade or business, or of any profession or calling by which the occupier seeks a livelihood or profit, are excluded from assessment on receipt of written notice by the surveyor of taxes from the person chargeable as occupier (1878, c. 15, s. 13), as explained in *Yorkshire Fire and Life Insurance Co.* v. *Clayton*, 1881, 8 Q. B. D. 421; *Corke* v. *Brims*, 1883, 1 Tax Cas. 531; *Smiles* v. *Crooke*, 1886, 2 Tax Cas. 162; *Hoddinot* v. *Home and Colonial Stores*, [1896] 1 Q. B. 169. This case contains a dictum that the exception does not apply where the landlord retains part and lets part in separate tenements.

Each set of chambers in the Inns of Court or Chancery is treated as an entire house, as are sets of rooms in colleges or halls in any university in Great Britain (1808, c. 55, Sched. B, iv.; 1890, c. 8, s. 28).

Halls or offices which are liable to rates or taxes (see INCOME TAX) are treated as inhabited dwelling-houses, and the owners are charged as occupiers (1808, c. 55, Sched. B, v.). This includes an assembly hall of an

ecclesiastical body (*Free Church of Scotland* v. *Bain*, 1897, 3 Tax Cas. 530). Shops and warehouses attached to a dwelling-house or communicating with it are valued as part of the house, except where the warehouses are on or near wharves on which the wharfinger has a dwelling-house for himself or his servants, or are separate and distinct buildings and not part of the dwelling-house or the attached shop, and are only used for the manufacture or storage of goods (1808, c. 55, Sched. B, iii.; *In re Russell*, 1877, 4 Rettie, 1143). The rule extends to banks when under the same roof as and communicating with dwelling-houses (*In re Union Bank of Scotland*, 1877, 1 Tax Cas. 195).

Exemptions.—The following inhabited houses are exempt:—

1. Any house belonging to the Queen or to any of the Royal family, and every public office for which the duties would be payable out of the public revenue (1808, c. 55, Sched. B; *Coomber* v. *Berks Justices*, 1883, 9 App. Cas. 61).

2. Any place which is a hospital, charity school, or house provided for the reception or relief of poor persons at the time when the tax falls to be levied (1808, c. 55, Sched. B).

This exemption does not extend to a hospital started by charity but wholly maintained out of payments by patients (*Needham* v. *Bowers*, 1888, 21 Q. B. D. 436), nor to schools which, while having endowments made with charitable objects, are not as a whole charity schools (*Charterhouse School* v. *Lamarque*, 1890, 25 Q. B. D. 121). It includes a lunatic asylum maintained for the poor out of public funds (*Jepson* v. *Gribble*, 1876, 1 Ex. D. 151), and one founded for the poor, and partly and substantially supported by charitable contributions (*Cawse* v. *Nottingham Lunatic Hospital*, [1891] 1 Q. B. 585); but not a lunatic asylum maintained chiefly by subscriptions supplemented by payments from patients (*Musgrave* v. *Dundee Royal Lunatic Asylum*, 1895, 3 Tax Cas. 363; 22 Rettie, 784). Where an institution is within this exemption the residences of officials within its grounds are also exempt (*Jepson* v. *Gribble*, *ubi supra*).

A college established in the interests of the higher education of women and half maintained by their fees is not a charity school (*Southwell* v. *Holloway College Governors*, [1895] 2 Q. B. 485).

School buildings not used as dwellings but for worship, education, or exercise only are not inhabited dwelling-houses at all (*Clifton College* v. *Tompson*, [1896] 1 Q. B. 432; *Charterhouse School* v. *Gayler*, [1896] 1 Q. B. 437).

3. Dwelling-houses which are unoccupied, or which are unfurnished, and in the occupation of persons or servants who are mere caretakers and do not pay poor-rate (1808, c. 55, Sched. B, r. xiv. (v.); 1825, c. 7, s. 3).

4. Dwelling-houses of a less annual value than £20 (1851, c. 36), and dwelling-houses built or adapted for separate dwellings of an annual value not exceeding £20 each. Where the medical officer of health for the district certifies that the dwelling is so constructed as to afford suitable occupation for each family or person inhabiting it, and that due provision is made for their sanitary requirements (1890, c. 8, s. 27 (2); 1891, c. 25, s. 4 (1)). On this point see further under *Duty, infra.*

5. Trade and business houses or tenements being distinct properties occupied *solely* for any trade or business, or any profession or calling by which the occupier seeks a livelihood or profit. This exemption is not lost by allowing a menial or domestic person employed by the occupier or any other person of a similar grade and description not otherwise employed by the occupier, engaged by him to dwell in the house or tenement *solely* for

its protection (1878, c. 15, s. 13 (2); 1881, c. 12, s. 24). To be entitled to the exemption the whole of the assessable subject must be occupied as above stated (*Banks* v. *Glasgow and S.-W. Rwy. Co.*, 1879, 17 Sc. L. R. 768).

This rule excludes cases in which part of the tenement is sub-let (*In re Scottish Widows' Fund*, 1880, 17 Sc. L. R. 314), or used as a hotel (*Banks* v. *Glasgow and S.-W. Rwy. Co.*, 1880, 17 Sc. L. R. 768; *British Linen Co.* v. *Forbes*, 1892, 3 Tax Cas.), or a business is carried on also by a person other than the occupier (*Smiles* v. *Merchant Co.*, 1889, 17 Rettie, 151), and farm-houses used as dwelling-houses (*In re Ainslie*, 1881, 1 Tax Cas. 342). It also excludes occupation by library attendants who are not servants or of the like description (*London Library Co.* v. *Carter*, 1890, 38 W. R. 478), or by servants who are not mere caretakers (*Lambton* v. *Kerr*, [1895] 2 Q. B. 233), and even by caretakers employed on condition that one of their family shall sleep on the premises (*Weguelin* v. *Wyatt*, 1885, 14 Q. B. D. 838), and messengers of an insurance company (*Forbes* v. *Standard Life Assurance Co.*, 1894, 3 Tax Cas. 368; 21 Rettie, 820). The trade or business do not include the management of an estate (*Muat* v. *Stewart*, 1890, 27 Sc. L. R. 294), nor a hotel (*Smith* v. *Petrie*, 1892, 29 Sc. L. R. 342; 3 Tax Cas. 155), nor a business in which no profit is sought (*British Institute of Preventive Medicine* v. *Styles*, 1895, 3 Tax Cas. 376).

No exemption from the duties is to be created by letters patent, grants, or charters (1803, c. 161, s. 77). This provision, significant before the Municipal Corporations Act, 1835, is now chiefly of historical interest.

The exemption of business premises can be claimed not merely for a whole year as under the original Acts, but for any entire quarter or quarters (1832, c. 113, s. 3).

All the exemptions except the first must be claimed by the persons who would otherwise be liable for the tax, by notice to the assessors, who make a return of the claims when sending in their certificates of assessments (1803, c. 161, s. 62).

Assessment.—The provisions of the older Act as to assessment are in the main superseded by the Taxes Management Act, 1880 (43 & 44 Vict. c. 19).

Outside the county of London the taxable subjects are assessed under the local commissioners of INCOME TAX by local assessors for each parish, who make and certify the assessments to the Commissioners for examination and amendment by the surveyors of taxes, after which they are allowed and certified by the Commissioners; when this is done, any person aggrieved by his assessment may appeal to the Commissioners, whose decision is final, unless they state a case for the High Court (1880, c. 19, ss. 49–59).

The assessors, inspectors, or surveyors are entitled to enter and inspect the premises to ascertain their annual value (1817, c. 25, s. 2).

The assessment is made on the "annual value," *i.e.* the "rack rent," if any, or if none, the rent which the property is worth to be let by the year (1803, c. 161, s. 10; *Campbell* v. *Inland Revenue*, 1879, 17 Sc. L. R. 23), *i.e.* it is in substance the same as for Schedule A of the INCOME TAX, but is separately made because of the difference of the incidence of the two taxes and the nature of the exemptions.

It must never be less than the rateable value for poor-rate (1808, c. 55, Sched. B, vii.). See RATING. The annual value of property adopted for house tax for the year ending April 5, 1897, has been continued for 1897–1898, and the inspectors and surveyors of taxes are made assessors as to those properties (59 & 60 Vict. c. 28, s. 30; 60 & 61 Vict. c. 24, s. 4 (3)); but, of course, houses not in assessment must be valued for 1897–98 by the rules above stated.

Every building capable of occupation as a dwelling-house, or which could be a taxable subject, is included in the assessment whether occupied or not when the assessment is made (1803, c. 161, s. 15).

In the county of London (except Penge) the annual value for house duty is the gross annual value stated as to any house in the Valuation List in force, which is prepared under the Metropolis Valuation Act, 1869 (c. 67). The assessment is made there in the first instance by the surveyors of taxes acting as assessors, and no local commissioners exist. See LONDON (COUNTY) *Valuation*. Provision is made by sec. 76 of the Valuation Metropolis Act, 1869 (c. 67), for separate valuation of dwelling-houses not separately valued on the valuation list.

In the Universities of Oxford and Cambridge the assessment of the university buildings and of the colleges, halls, and hostels, and the offices and employments connected therewith, is under the jurisdiction of the general commissioners of each university, and the one over which the jurisdiction extends is treated as a single parish for assessment and collection (1890, c. 8, s. 28).

Where a house or taxable tenement ceases to be occupied after assessment, and during the period of charge whether at the end of the lease or demise, the occupier on giving notice to the assessor of the tax is entitled to be discharged by the Commissioners from the tax for those quarters in which the house is not occupied; but on the house being reoccupied it becomes liable to assessment and charge (1825, c. 7, ss. 2, 3). Houses completed for occupation after the time for assessment and subsequently occupied, are subject to duty from the end of the quarter preceding occupation. But if notice of occupation is not given, or it begins before the end of the first quarter of the year, the tax is payable for the whole year (1808, c. 55, Sched. A, v.; 1825, c. 7, s. 2).

Duty.—There are two scales of duty, higher and lower, fixed by the Act of 1851, as modified by subsequent legislation.

1. Ordinary dwelling-houses—

ANNUAL VALUE.	RATE.	ACT.
£20 and not exceeding £40 . . .	3d. in the £ .	(1890, c. 8, s. 25 (1)).
Exceeding £40 and not exceeding £60 .	6d. „ .	(1890, c. 8, s. 25 (2)).
Exceeding £60	9d. „ .	(1851, c. 36, Sched.).

2. Shops, hotels, and inns, coffee-houses, lodging-houses, farm-houses—

ANNUAL VALUE.	RATE.	ACT.
£20 and not exceeding £40 . . .	2d. in the £ .	(1890, c. 8, s. 25 (1)).
Exceeding £40 and not exceeding £60 .	4d. „ .	(1890, c. 8, s. 25 (2)).
Exceeding £60	6d. „ .	(1851, c. 36, Sched.).

The Act of 1851 imposed the 6d. rate on shopkeepers and licensed victuallers and farmers. The Act of 1871, c. 103, s. 31, extended it to hotel-keepers, inn-keepers, and coffee-house keepers, whether licensed victuallers or not; and that of 1890, c. 8, s. 26, extended it to persons occupying a house with the main object of letting furnished lodgings if registered with the clerk to the Commissioners.

Hydropathic institutions are treated as hotels (*In re Strathearn Hydropathic, etc.*, 1881, 1 Tax Cas. 375).

Where a house was originally built or has been adapted by addition or alteration, and is used so far as it is used for a dwelling-house for the sole purpose of providing separate dwellings at an annual value not exceeding £40 for each, on production of a sanitary certificate, the assessment is

confined to the annual value of the house, exclusive of every dwelling in it of an annual value under £20, and by reducing the duty to 3d. (1891, c. 25, s. 4 (2)).

Collection and Management.—The house tax as an assessed tax is under the direction and management of the Commissioners of Inland Revenue (1851, c. 36, s. 2). The general procedure for its levy is under the Taxes Management Act, 1880 (43 & 44 Vict. c. 19). See INCOME TAX; INLAND REVENUE.

The assessments are in the custody of the clerk to the local commissioners of income tax, and in London the original lists are kept by the clerk of the County Council; a duplicate list is kept with the rate books of the parish to which it relates (1869, c. 67, ss. 68, 69).

Payment of the duty did not give a poor-law settlement (1803, c. 161, s. 59). See POOR LAW.

[*Authorities.*—Dowell, *House Tax Laws*, 1893, and the Reports of Tax Cases published by the Commissioners of Inland Revenue, most of which are also reported in the current series of English and Scotch Law Reports.]

Housing of Working Classes.—See ARTISANS; WORKING CLASSES.

Hue and Cry.—The hue and cry (*hutesium et clamor*) is the old common law process of pursuing with horn and voice, on horse or foot, from vill to vill, felons or such as have dangerously wounded another. (As to the early history of the hue and cry, see Pollock and Maitland, *Hist. Eng. Law*, vol. ii. p. 576.)

Originally it seems that a man captured by the hue and cry while he still had about him the signs of his guilt was liable to summary execution when brought to a Court, and was not allowed to claim any sort of trial. From the end of the twelfth century the hue and cry was gradually by edicts, writs, and statutes regulated and brought into harmony with the procedure of the Courts (see *Editum Regium*, 1195; Stubbs, *Select Charters*, p. 263; *Writ for conferring Watch and Ward*, 1252; Stubbs, *Select Charters*, p. 370; Statutes 13 Edw. I. st. 2, cc. 1 and 4; 27 Eliz. c. 13; and 8 Geo. II. c. 16). These statutes were repealed by the Act 7 & 8 Geo. IV. c. 27 (see also 3 Edw. I. c. 9).

The hue and cry may be raised by any individual who is robbed or knows of a felony, or by any officer of justice; but it is best, if possible, that it should be raised by the latter, and an officer engaged in a hue and cry has the same powers as if acting under a magistrate's warrant. In the case of a hue and cry, if the person pursued takes refuge in a house, the doors may be broken open upon his refusal to open after a demand has been made by an officer; and a party pursued by a hue and cry may be lawfully apprehended and committed to prison, although it afterwards appears that he is innocent. A person raising a hue and cry without cause is, however, liable to fine and imprisonment, and also to an action for damages by the person injured thereby. The Act 7 Geo. IV. c. 64, s. 28, permits the Courts to order rewards for persons making themselves particularly active in the arrest of certain offenders, and the Sheriffs Act (50 & 51 Vict. c. 55), 1887, c. 55, s. 8, subs. (1), re-enacting the Statute 3 Edw. I. c. 9, provides that every person in a county shall be ready and apparelled at the command of the sheriff and at the cry of the country to arrest a felon whether within a franchise or without and in default shall on conviction be liable to a fine; and if default be found in the lord of the franchise, he shall forfeit the

franchise to the Queen, and if in the bailiff, he shall be liable to imprisonment.

[*Authorities.*—Stubbs, *Select Charters*; Pollock and Maitland, *Hist. Eng. Law*; Hale, *Pleas of the Crown*; Hawkins, *Pleas of the Crown*; Black. *Com.*; Stephen, *Com.*]

Huissier (Fr.), a term met with in the Law Reports in cases involving French law, derived from the old French *huis*, meaning door, hence doorkeeper of the Court (cp. *huis-clos*, closed doors), a Court officer whose functions were originally confined to the interior of the Court chamber. Under contemporary French procedure he acts as process-server, those attached to the Court (or while acting in that capacity) being distinguished from the ordinary huissiers by the term *huissiers audienciers*.

Humber Rules.—These are rules for the navigation of the river Humber, made by Order in Council under the power given in sec. 421 of the M. S. A., 1894, and which incorporated the old Collision Regulations (see COLLISIONS AT SEA). A breach of them has the same effect as a breach of the general regulations, namely, it creates a presumption of negligence, which can only be rebutted by showing that the breach could not have contributed to the collision (*The Ripon*, 1885, 10 P. D. 65; and see *The Magneta*, 1890, 15 P. D. 101).

Hundred—An old territorial division composed of a cluster of townships, and intermediate between the township and the shire. The origin of the hundred or wapentake has formed the subject of much conjecture, but the theory which has found most acceptance is that it was originally due to the association of a hundred men for purposes of defence, and that it was only at a later date that the name was used to denote a territorial division. As an institution for police purposes the hundred first appears in the ordinances of Edgar, which required that in the hundred every man should do justice to another, and that thieves should be pursued and brought to justice (Stubbs, *Select Charters*, ed. 1870, p. 69). This obligation of raising the hue and cry after felons was re-imposed by subsequent statutes, among others by the Statute of Winchester (13 Edw. I. c. 2), which also made the hundred collectively liable for robberies committed within the district of the hundred where the offender could not be found and brought to justice. In succeeding centuries the hundred as a distinct division of the county gradually declined in importance, but a relic of its collective liability for damages existed till 1886 in the liability to make compensation to persons whose property was feloniously injured or destroyed by rioters. This liability, however, was removed by a statute of the year mentioned (the Riot (Damages) Act, 1886), which threw the liability on to the police rate. Even yet a hundred rate may be levied for the purposes of certain main roads, under the provisions of sec. 20 of the Highway Act, 1878, a section which is incorporated in the Local Government Act, 1888, but in this (which applies chiefly to the county of Lancaster) we see practically the sole survival of the hundred as a department of English local government. See HUNDRED COURT; HUNDREDORS.

[*Authorities.*—Stubbs, *Constitutional History of England*, ed. 1874, vol. i. pp. 96–108; Pollock and Maitland, *Hist. Eng. Law*, vol. i. pp. 543–547.]

Hundred Court.—Like the county, the hundred or wapentake had its own moot or court for dealing with matters, both civil and criminal, within the hundred. By the ordinances of Edgar, the men of the hundred were required to meet once within every four weeks; later, the Court met oftener. "It was attended by the lords of land within the hundred or their stewards representing them, and by the parish priest, the reeve, and four best men of each township" (Stubbs, *Constitutional History of England*, ed. 1874, vol. i. pp. 102, 103). At first the judges seem to have been the whole body of suitors, but at a later date power appears to have been delegated to a body of twelve (*ibid.*). The jurisdiction of the county and hundred Courts was practically alike, except as to the area over which it extended. On the institution of the system of frankpledge, the sheriff attended each hundred Court, except those which were in private hands as many were, twice yearly to see that every man was properly enrolled in his tithing, and also to receive presentments of grave offences. Many of the old hundred Courts existed till comparatively recently, but by sec. 28 of the County Courts Act, 1867, provision was made for the suppression of such of them as were not Courts of Record. The Salford Hundred Court is an instance of one of these ancient judicatories; it was remodelled by the Salford Hundred Court of Record Act, 1868.

[*Authorities.*—Stubbs, *Constitutional History of England*, ed. 1874, vol. i. pp. 102 *et seq.*; Pollock and Maitland, *Hist. Eng. Law*, vol. i. pp. 544 *et seq.*]

Hundredors—The men of a hundred (*q.v.*). In the old law when juries were required to be taken from the neighbourhood of the vill or place where the cause of action arose, challenges might be made to the array for a defect of hundredors. This, however, has long been abolished.

Husband and Wife.

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The following article deals only with those rights and liabilities of married women, and those mutual proprietary rights and obligations of husband and wife, of which the Courts of Common Law and Equity take cognisance. With matrimonial offences and such questions relating to the conduct of the parties as fell formerly within the jurisdiction of the Ecclesiastical Courts, and are now dealt with by the (Probate and) Divorce Division of the High Court, this article is not concerned. Such topics are discussed in the articles on Marriage and Divorce.

1. Wife's Rights in her Husband's Property.

At the present day such rights as a wife has only arise on the death of her husband intestate. On that event she has—(*a*) a life interest in a portion of the real estate of which he dies intestate, provided he has not excluded her therefrom; (*b*) a certain interest in his personal estate under the Statutes of Distribution; (*c*) a certain qualified right to administer to his estate.

(*a*) The first of these rights is all that remains of the ancient Dower, a right which the common law gave to a widow for the sustenance of herself and her children (*Co. Litt.* 31 *a*). "Where a woman taketh a husband seised of such an estate in tenements, etc., so as by possibility it may happen that the wife may have issue by her husband, and that the same issue may by possibility inherit the same tenements of such an estate as the husband hath, as heir to the husband, of such tenements she shall have her dower, and otherwise not" (*Litt.* s. 53). Three conditions were therefore necessary to entitle the wife to dower—(i.) Marriage; (ii.) sole seisin of an estate of inheritance; (iii.) death of the husband (*Co. Litt.* 31 *a*). It was not necessary that there should be issue in fact of the marriage (*Litt.* s. 36), but it was necessary that there should be a possibility of issue who could inherit; and therefore if lands were limited to a man and his heirs by a certain marriage in tail, and his wife died and he married again, his second wife would have no dower out of those lands (*Litt.* s. 53). Assuming these three conditions fulfilled, the widow was entitled to an estate for life in one-third of the lands of which her husband was solely seised for an estate of inheritance in possession at any time during the coverture. The husband must have been "seised"; therefore the widow was not dowable out of his equitable estates (*Co. Litt.* 29 *a*), including a mere equity of redemption (*Dawson* v. *Bank of Whitehaven*, 1877, 6 Ch. D. 218). With regard to the "tenements, etc." out of which a widow is dowable, this expression includes manors, rents, rights of common, profits, tolls, advowsons, tithes, fairs, markets, and other rights (see Park, *Dower*, p. 111; I. Roper, *H. & W.* 342); mines, if opened in her husband's lifetime, otherwise not (*Stoughton* v. *Leigh*, 1808, 1 Taun. 402; 11 R. R. 810). The wife's right to dower attached in interest at the instant when marriage and seisin co-existed; the death of the husband only consummated the right. She had therefore during her husband's life an interest which she could part with, and there is no question but that if a husband and wife levied a fine (*Lampet's* case, 1613, 10 Rep. 49 *b*) or suffered a recovery (Park, *Dower*, 193) the wife was barred of her dower.

A wife could not, however, release her right to dower; and as accord and satisfaction could not be pleaded at law to a real action, no acceptance of any other benefit would bar her right to claim dower (*Vernon's* case, 1573, 4 Rep. 1 *a*). Hence the practice arose in early times of conveying lands to uses, thus making the husband's estate an equitable and not a legal one, with the exception of a legal joint estate (*junctura*) during the life of the wife to secure a provision for her called a jointure. Now when the Statute of Uses was passed (27 Hen. VIII.), converting the use into the legal seisin, wives would have been entitled to both jointure and dower but for sec. 6, which provided that women having an estate in jointure with their husbands should not be entitled to dower. If jointure were made after marriage, this statute put the widow to her election between the jointure and dower. Jointure soon acquired a wider meaning, and is defined in *Vernon's* case, 1573, 4 Rep. p. 2 *b*, to be "a complete livelihood of freehold for the wife of lands or tenements, etc., to take effect presently

in possession or profit after the decease of her husband for the life of the wife, at least, if she herself be not the cause of its determination or forfeiture." At law, unless this definition was fulfilled, the widow was neither barred of dower nor put to any election. But in a Court of Equity it was very different, for an intended wife of full age might bind herself to take any reasonable provision, such as a term of years or an annuity, as an equitable jointure, in satisfaction of dower. But in equity, as at law, to be an absolute bar to dower, this equitable jointure had to be accepted before marriage. If made after marriage the Court put the widow to her election.

Before the Dower Act a difficult question often arose as to whether a legacy or other bequest given to a widow was intended to be in satisfaction of dower so as to put her to her election, a question in the last resort depending on the construction of the bequest. The subject has lost so much of its former importance that it is not thought necessary to do more than refer the reader to I. Rop. *Husband and Wife*, 565 *et seq.*, where it is discussed at length.

When dower had been duly assigned in accordance with the widow's rights at common law her title had relation back to her husband's original seisin, and had priority over all charges and incumbrances and debts created or incurred by him during the marriage after he had acquired the estate. If he conveyed the estate to a *bonâ-fide* purchaser for value, the purchaser took subject to the widow's dower (*Doe* v. *Gwinnell*, 1841, 1 Q. B. 682). When, therefore, it became desirable that real estate should be more readily alienable, dower ceased to be a benefit and became a burden, and the ingenuity of conveyancers devised the uses to bar dower, by means whereof the fullest powers of disposition were conferred upon the husband without his having an estate of inheritance in possession. The land was conveyed to such uses as the husband should appoint; in default of such appointment, to the use of the husband and his assigns for life; from and after the determination of that estate, by forfeiture or otherwise, in the purchaser's lifetime, to the use of trustees during the husband's life in trust for him and his assigns; and after his death to the use of him, his heirs, and assigns for ever. This form is probably to be ascribed to the learned author of Fearne on *Contingent Remainders* (see 4th ed., vol. i. p. 509).

All women married after the 1st of January 1834 come under the provisions of the Dower Act (3 & 4 Will. IV. c. 105). This Act applies to freehold and gavelkind lands, and probably also to lands held by the custom of borough-English (*Farley* v. *Bonham*, 1861, 30 L. J. Ch. 239), but not to copyhold lands (*Smith* v. *Adams*, 1854, 5 De G., M. & G. 712). Under this Act a widow is dowable out of lands in which her husband's interest was equitable, or partly legal and partly equitable (s. 2), provided it was an estate of inheritance in possession, or equal to an estate of inheritance in possession (*In re Michell*, [1892] 2 Ch. 87) other than a joint tenancy. If the husband's interest is a right of entry that is sufficient (s. 3), provided the claim to dower is enforced before the right of entry is barred. But she is not dowable out of any lands of which her husband actually disposed in his lifetime or by will (s. 4). A widow is not entitled to dower out of any land of her husband where, in the deed by which such land is conveyed, or by any deed executed by him, it shall be declared that his widow shall not be entitled to dower out of such land (s. 6). Nor is she entitled to dower out of any land of which her husband dies wholly or partially intestate, when by his will he declares his intention that she shall not be entitled to a dower out of such land or out of any of his land (s. 7)

Her right is subject to any conditions, restrictions, or directions declared by her husband's will (s. 8). Where a husband devises land out of which his widow would have been dowable if the same were not so devised, or any estate or interest therein, to or for the benefit of his widow, she is not dowable out of any of his land unless a contrary intention appears in his will (s. 9). A devise of real estate to trustees on trust to sell and to pay an annuity out of the proceeds is a devise of an interest in land (*Lacy* v. *Hill*, 1875, L. R. 19 Eq. 346; *In re Thomas*, 1886, 34 Ch. D. 166). But no gift or bequest out of personal estate, or out of land not liable to dower, will defeat her right to dower unless a contrary intention is expressed in the husband's will (s. 10). The Court may enforce an agreement by the husband not to bar his wife's right to dower (s. 11). Formerly, if a legacy were given in satisfaction of dower, it was entitled to priority over simple legacies, for it was considered the price of the dower. By sec. 12, nothing in the Act is to interfere with any rule of equity by which legacies bequeathed in satisfaction of dower are entitled to priority over other legacies. But this rule only applies where, if she had not accepted the gift in satisfaction, the widow would have been entitled to dower (*In re Greenwood*, [1892] 2 Ch. 295). By sec. 5, dower is made subject to all partial estates and interests, and all charges which the husband may have created, and also to all debts, incumbrances, and contracts to which the land may be liable.

By 20 Hen. III. c. 2, the widow is entitled to crops and emblements upon estates belonging to her in dower, and she may bequeath them by her will. If a wife commits adultery uncondoned by her husband she forfeits her dower by Statute 13 Edw. I. (Westminster 2), c. 34; and that whether she is living apart from him by his consent (*Hethrington* v. *Graham*, 1829, 6 Bing. 135; 31 R. R. 361), or on account of his cruelty (*Woodward* v. *Dowse*, 1861, 10 C. B. N. S. 722). After decree of divorce her right is at an end (*Frampton* v. *Stephens*, 1882, 21 Ch. D. 164), *secus* of a decree for judicial separation (*ibid.*).

The old writ of dower prescribed by 20 Hen. III. c. 1 was abolished by the Common Law Procedure Act, 1860, s. 26, an ordinary action being substituted commenced by a writ endorsed with a notice that the claim is for dower. The procedure under the Judicature Acts is the same (R. S. C., 1883, Orders 1 and 2, and App. A, Part II., s. 4 to the Rules). The widow must bring her action within twelve years after the right of action first accrued (37 & 38 Vict. c. 57, s. 1). She can only recover six years' arrears (3 & 4 Will. IV. c. 27, s. 42). A widow tenant in dower is liable for waste (*Co. Litt.* 53, 54). She may exercise the powers of a tenant for life to lease for twenty-one years under sec. 46 of the Settled Estates Act, 1878.

By the common law confirmed by Statute 9 Hen. III. c. 7 (Magna Carta), a widow is entitled to tarry in the chief house of her husband for forty days after the death of her husband, within which days her dower shall be assigned her (unless it were assigned before), or that the house be a castle; and if she depart from the castle, then a competent house shall be forthwith provided for her in the which she may honestly dwell until her dower be to her assigned as it is aforesaid; and she shall have in the meantime her reasonable estovers of the common. This right is called the right of Quarantine.

A widow may, by custom of the manor, be entitled to Free-bench out of the copyhold estates of which her husband dies seised. As this right depends upon the custom of each particular manor it is impossible here to lay down any general rules relating to it. If the custom require seisin at the husband's death there could be no free-bench out of copyholds which he

surrendered to the use of his will. It is no longer necessary for a testator to surrender to the use of his will. His will, however, without the surrender, has the same effect and bars his widow's right to free-bench (*Lacy* v. *Hill*, 1875, L. R. 19 Eq. 346).

(*b*) By secs. 5 and 6 of the Statute of Distributions (22 & 23 Car. II. c. 10), if a man dies intestate as to personal estate any surplus that remains after payment of his debts and funeral expenses is distributed between his widow and children, or his widow and the representatives of his children, the widow taking one-third and the children or their representatives two-thirds. If he leaves no children or representatives of deceased children, his widow takes one-half and his next-of-kin the other half. If he leaves no children, representatives of children, or next-of-kin, the widow still takes only one-half and the other half goes to the Crown. Further, by the Intestates Estates Act, 1890 (53 & 54 Vict. c. 29), it is enacted that where a man dies intestate, leaving a widow and no issue, if the net value of his real and personal estate does not exceed £500, such real and personal estate shall belong absolutely and exclusively to the widow. Where the net value exceeds £500, the widow is entitled to £500 and to a charge on the estate for that sum and interest at 4 per cent. This provision is in addition to that share in the residue, after payment of the £500, to which the widow would have been entitled if such residue formed the whole of the intestate's estate and the Act had not been passed.

(*c*) By Statute 21 Hen. VIII. c. 5, the ordinary may grant administration of her husband's estate to his widow or next-of-kin, or both, at his discretion. The Court generally grants administration to the widow, unless there be reason to the contrary, as that the parties were separated (*Lambell* v. *Lambell*, 1831, 3 Hagg. 568), or the widow had in her marriage settlement renounced all right to her husband's personal estate (*Walker* v. *Carless*, 1758, 2 Lee, *Ecc. Ca.* 560).

2. Husband's Rights in His Wife's Property.

(*a*) *Real Estate.*—The effect of marriage on a woman was to give certain rights to the husband over her property. By the intermarriage the husband acquired a freehold interest, during the joint lives of himself and wife, in all freehold property of which she was seised at that time, or of which she became seised during the coverture. During that period the husband and wife were seised in fee in right of the wife (*Polybank* v. *Hawkins*, 1780, Doug. 329); the husband was entitled to the rents and profits, and had the right of possession though the wife had the right of property. Payment of rent to the wife was no discharge (*Tracy* v. *Dutton*, 1622, Cro. (2) 617) unless the husband had given her authority to receive it (*Doe d. Leicester* v. *Biggs*, 1808, 1 Taun. 367; 11 R. R. 533). The husband was entitled to possession of the title-deeds during the marriage, but it is thought that the assignee of his interest would not be entitled to them (see *Ex parte Rogers, In re Pyatt*, 1884, 26 Ch. D. 31). If the wife's estate was an estate for life, her husband alone was liable for waste committed during the coverture (*Kingham* v. *Lee*, 1846, 15 Sim. 396). His estate was a freehold which he could convey, and he could without his wife make a tenant to the præcipe for suffering a recovery (Pigott on *Recoveries*, 72); but the conveyance only took effect during the coverture (*Robertson* v. *Norris*, 1848, 11 Q. B. 916). Apart from this freehold interest of the husband, the wife's estates of inheritance remained, and still remain, entire in her after the death of her

husband, or in her heirs if she dies before him; unless by the birth of a child he becomes tenant for life by the CURTESY (*q.v.*) (2 Black. *Com.* 433). A husband holding over after his interest has determined, without the consent of those entitled in remainder, is a trespasser, and liable in damages for the rents and profits received during his wrongful possession (Statute 6 Anne, c. 18, s. 5). Still, a married woman could not, except as donee of a power of appointment, dispose of her freehold estates, whether by deed, for this was void (Perkins, s. 6), or by will (34 & 35 Hen. VIII. c. 5, s. 14; 1 Vict. c. 26, s. 8), or by any other private conveyance. These estates were formerly conveyed by a fine or common recovery in which she was examined separately and in private, to ascertain whether she joined in the fine or recovery of her own free will. The Fines and Recoveries Act (3 & 4 Will. IV. c. 74, s. 77) substituted for this method a deed of conveyance acknowledged by the wife after separate examination before commissioners or a commissioner (Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 7; *Tennent* v. *Welch*, 1888, 37 Ch. D. 622; *Roberts* v. *Cooper*, [1891] 2 Ch. 335). This acknowledgment may be taken at any time after the execution of the deed (*In re London Dock Act*, 1856, 25 L. J. Ch. 45). Formerly a certificate had to be lodged within a month after the acknowledgment, but this is no longer necessary (45 & 46 Vict. c. 39, s. 7). The acknowledgment may be taken abroad on commission (3 & 4 Will. IV. c. 74, s. 83; *In re Howard*, 1864, L. R. 9 C. P. 347). The husband's concurrence was also necessary to the validity of the conveyance. Bankruptcy did not preclude him from concurring; and a conveyance under the Act is good against his trustee or assignee for the benefit of creditors (*Cooper* v. *Macdonald*, 1877, 7 Ch. D. 288). But by sec. 91 of the Act it could be dispensed with in certain cases by leave of the Court of Common Pleas, and later of the Queen's Bench Division, or Chancery Division, if other relief were sought in the province of that Division (*Ex parte Thompson*, W. N., 1884, 28; *In re Giles*, 1894, 70 L. T. 757). If, for example, the husband were insane, or an infant, or if his residence were not known, or he were living apart from his wife, the Court, on the wife's affidavit stating the facts, would dispense with his concurrence. The wife could then convey as a *feme sole* without acknowledgment. As to the effect of a deed made under such circumstances, see *Goodchild* v. *Dougall*, 1876, 3 Ch. D. 650; *Fowke* v. *Draycott*, 1885, 29 Ch. D. 996. An order dispensing with the concurrence might be rescinded in certain events (*Ex parte Cockerell*, 1878, 4 C. P. D. 39), but not so as to affect intervening rights (*In re Rogers*, 1865, L. R. 1 C. P. 47). By a conveyance under this Act the real estate of a married woman, whether vested or contingent, and whether in possession, remainder, or reversion, might be disposed of.

As a married woman had formerly no power to contract she could not, at anyrate until the Fines and Recoveries Act, make a binding contract to sell her real property. But as that Act gave her power to dispose of her real property as a *feme sole* in the way above described, and as a *feme sole* could for valuable consideration dispose of her property in equity, it was held that by a deed acknowledged by the wife, and concurred in by the husband, she might for valuable consideration contract to sell her real estate (*Crofts* v. *Middleton*, 1856, 8 De G., M. & G. 192, 219).

The general principle, that a person may by his fraud preclude himself from asserting a claim which he would otherwise be entitled to make, applies none the less in case of a married woman (*Savage* v. *Foster*, 1723, 9 Mod. 35; *Sharpe* v. *Foy*, 1868, L. R. 4 Ch. 35; *Cahill* v. *Cahill*, 1883, 8 App. Cas. 420). And upon the same principle she might, by the exercise

of an election between two gifts, bind her interest in real property without a deed acknowledged (*Barrow* v. *Barrow*, 1858, 4 Kay & J. 409), unless the nature of her interest in the property to be relinquished created an obstacle (*Cahill* v. *Cahill*, *ubi supra*). Where husband and wife joined in mortgaging the wife's real property, reserving the equity of redemption to the husband, it was always a question of intention whether he took beneficially or merely as trustee for his wife (*In re Betton's Trust Estates*, 1871, L. R. 12 Eq. 553).

(*b*) *Chattels real.*—With regard to the wife's chattels real, the husband was during the coverture possessed of these in her right (*Co. Litt.* 351 *a*). He could therefore by act *inter vivos* assign, underlet, mortgage, or contract to dispose of them so as to bind the wife if she survived him (*Stead* v. *Creagh*, 1723, 9 Mod. 43; *Bates* v. *Dandy*, 1741, 2 Atk. 207). And that whether they were legal or equitable, and whether in possession or reversion, vested or contingent, provided they could possibly fall into possession during the marriage (*Donne* v. *Hart*, 1831, 2 Ry. & M. 360). They were liable for his debts and would vest in his trustee or assignee in bankruptcy (*Doe d. Shaw* v. *Stewart*, 1834, 1 Ad. & E. 300). The wife could not dispose of them by deed or will. If she survived, the chattels real, or so much thereof as the husband had not disposed of during the coverture, survived to her, and the husband's will was inoperative upon them (*Co. Litt.* 351). But if the husband survived he became entitled to them *jure mariti* without taking out administration (Roll. *Abr.* "Baron and Feme," H. 8; *In re Bellamy Elder* v. *Pearson*, 1883, 25 Ch. D. 620). If a husband mortgages his wife's leasehold and reserves the equity of redemption to himself, it would seem that he would be treated as a trustee for her. An agreement by the husband to mortgage did not deprive the wife of the right to redeem (*Bates* v. *Dandy*, 1741, 2 Atk. 207).

(*c*) *Personal Chattels.*—With regard to the wife's personal chattels in possession, whether acquired before or after marriage, whether acquired by gift, for example, to the wife alone, or to the husband and wife jointly, or by her own labour and skill (*Buckley* v. *Collier*, 1693, 1 Salk. 114), they vested absolutely in the husband (Com. *Dig.* "Baron and Feme," E. 3). Chattels held by a bailee for the wife were for this purpose her chattels in possession. The wife could not deal with them in any way, for she had no property in and no power of disposing of them. On her death they passed to the husband if he survived, and to his personal representatives if he predeceased her. They might, however, pass by her will if her husband assented to it, after knowing its contents (*Brook* v. *Turner*, 1677, 2 Mod. 170), or *semble*, if he bound himself by contract for valuable consideration to assent. Her paraphernalia, consisting of jewels and trinkets to be worn by her as personal ornaments, were the only exception to these rules. They passed to the wife on her husband's death if he had not disposed of them by act *inter vivos*, subject to the claims of his creditors. The wife's choses in action might be reduced into possession by the husband. If and when this was done they became his choses in possession. If the husband died without having reduced them into possession, the widow was entitled to them as against the husband's representative. If the husband survived he was entitled to them as her administrator, and until he took out administration he had no right at all. If he died without administering, the wife's administrator, and not the husband's, was entitled to the choses in action. It was formerly considered that negotiable instruments were choses in possession to which the husband was entitled *jure mariti* (*M'Neilage* v. *Holloway*, 1818, 1 Barn. & Ald. 218) because the husband might

endorse his wife's negotiable instruments; but this doctrine has, rightly, not prevailed (*Sherrington* v. *Yates*, 1844, 12 Mee. & W. 855).

A chose in action is not reduced into possession until the husband has for some moment of time had absolute dominion over it without any concurrence of the wife (*Nicholson* v. *Drury Buildings Estate Co.*, 1877, 7 Ch. D. 48). If the husband assigned his wife's chose in action, the assignee stood in the shoes of the husband. So of the husband's trustee in bankruptcy (*Pierce* v. *Thornley*, 1828, 2 Sim. 167). If the assignee did not reduce into possession during the coverture, the wife's title by survivorship prevailed over the assignment. In case of the wife's reversionary choses in action, such as a legacy payable to her after the determination of a life interest, difficulties arose which led to the passing of Malins' Act (20 & 21 Vict. c. 57). On the determination of the life interest the legacy became a chose in action, and subject to the rules above stated. The wife could not deal with it. If the husband assigned it, his assignee had to reduce it into possession, and none the less because at the date of the assignment it was still reversionary. If before he did so, and, *à fortiori*, if before the reversion fell in, the husband died leaving the wife surviving, the assignee took nothing; and if the reversion could not fall in until after the husband's death, it was simply inalienable during the coverture (*Box* v. *Box*, 1843, Drury *temp.* Sugden, 42; *Whittle* v. *Henning*, 1848, 2 Ph. 731). Malins' Act (20 & 21 Vict. c. 57) therefore provided that a married woman might dispose of future or reversionary interests, whether vested or contingent, in any personal estate to which she or her husband in her right might become entitled under any instrument made after the 31st of December 1857 (except her marriage settlement), or release a power over such personal estate, by a deed acknowledged by her and concurred in by her husband according to the provisions of the Fines and Recoveries Act. The effect of an assignment under Malins' Act was considered in *In re Batchelor*, 1873, L. R. 16 Eq. 481, and *In re Jakeman's Trusts*, 1883, 23 Ch. D. 344).

As in the case of her real estate (*vide supra*), a married woman might probably deal with her reversionary personalty by a contract acknowledged by her and concurred in by her husband, or by a fraud or an election. See further, *Greenhill* v. *North British Mercantile Insurance Co.*, [1893] 3 Ch. 474.

(*d*) *Equity to a Settlement.*—The right of a husband to reduce his wife's choses in action into possession, though formerly absolute at law, was subject to an important qualification in equity. If he invoked the assistance of a Court of Equity, the Court, on the principle that he who seeks equity must do equity, ordered a fitting settlement to be made upon his wife and children out of the fund recovered. After the passing of the Judicature Acts this equity to a settlement was enforced by the Common Law Divisions as well as by the Chancery Division. The doctrine was afterwards extended to cases where the wife herself prayed the aid of the Court (*Lady Elibank* v. *Montolieu*, 1801, 5 Ves. 737; 5 R. R. 157), and now her equity to a settlement would be enforced both in actions in the Queen's Bench and Chancery Divisions. The equity prevails against the claims of the husband himself, his trustee in bankruptcy, his assignee for the benefit of creditors, and even his assignee for valuable consideration (*Scott* v. *Spashett*, 1851, 3 Mac. & G. 599). Not merely pure personalty, but terms of years, whether equitable (*Hanson* v. *Keating*, 1844, 4 Hare, 1) or legal (*Boxall* v. *Boxall*, 1884, 27 Ch. D. 220), were subject to it; but not the inheritance of an estate in fee, for marriage only affected the wife's life interest, nor property limited to husband and wife for their joint lives and the life of the survivor (*In re*

Bryan, 1880, 14 Ch. D. 516); and it did not affect the husband's estate by the curtesy (*Smith* v. *Matthews*, 1860, 3 De G., F. & J. 139).

The Court would not in general settle on the wife the income of property which accrued during the marriage (*Tidd* v. *Lister*, 1853, 3 De G., M. & G. 857), but in exceptional cases (*Steed* v. *Calley*, 1833, 2 Myl. & K. 52; *Bond* v. *Simmons*, 1743, 3 Atk. 21; *Roberts* v. *Cooper*, [1891] 2 Ch. 335), especially if the husband had deserted the wife, the Court gave her the income, and her right to it prevailed against the husband's trustee in bankruptcy or assignee (*Lumb* v. *Milnes*, 1800, 5 Ves. 517; *Tidd* v. *Lister*, 1853, 3 De G., M. & G. 857; *Squires* v. *Ashford*, 1856, 23 Beav. 132), but not against his assignee for value if at the date of the assignment he was maintaining his wife (*Tidd* v. *Lister*, 1853, 10 Hare, 140; 3 De G., M. & G. 857; *In re Duffy's Trusts*, 1860, 28 Beav. 386; *Elliott* v. *Cordell*, 1819, 5 Madd. 149; 21 R. R. 287). The settlement included the children as its objects, but the right to claim it was personal to the wife, and if she died without asserting her equity the children could not claim it (*Scriven* v. *Tapley*, 1765, 2 Eden, 337; *Lloyd* v. *Williams*, 1816, 1 Madd. 450).

The amount settled is in the judicial discretion of the Court under the circumstances of each case (*Fowke* v. *Draycott*, 1885, 29 Ch. D. 996). The existence and provisions of any prior settlement and the conduct of the husband were the more important circumstances. Sometimes the whole was settled on the wife (*Reid* v. *Reid*, 1886, 33 Ch. D. 220). Sometimes the whole was paid to the husband (*Giacometti* v. *Prodgers*, 1873, L. R. 8 Ch. 338). In *Callow* v. *Callow*, 1886, 55 L. T. 154, two-thirds was settled on the wife of an undischarged bankrupt who was contributing to her support. The general rule was to settle one-half in the absence of special circumstances (see *Murray* v. *Lord Elibank*, 1804, 1 White and Tudor's *Leading Cases*, 7th ed., pp. 621, 639; 7 R. R. 346). The practice and procedure in claiming a settlement will be found in Daniell's *Chancery Practice*, 6th ed., pp. 125 *et seq.*

The wife may, by her conduct, preclude herself from asserting her equity (*In re Lush's Trust*, 1869, L. R. 4 Ch. 591, or she might waive it (*Campbell* v. *Harding*, 1833, 6 Sim. 283). She might, by an agreement in her marriage settlement, bind herself not to insist on it (*Carr* v. *Taylor*, 1805, 10 Ves. 574; 8 R. R. 40). An assignment by husband and wife under Malins' Act bars the wife's equity to a settlement in the reversionary interest assigned (*Cooke* v. *Williams*, 1863, 11 W. R. 504). The settlement was a settlement for valuable consideration if made before, and a voluntary settlement if made after, reduction into possession by the husband of the fund settled (*Wheeler* v. *Caryl*, 1751, Amb. 121; *Ryland* v. *Smith*, 1 Myl. & Cr. 53). More particular learning on this subject, which is rapidly becoming obsolete, may be found in the notes to *Murray* v. *Lord Elibank* in White and Tudor's *Leading Cases*, 7th ed., vol. i. p. 621.

In the days when the law gave these large rights to the husband, if the wife on the eve of marriage, in fraud of his marital rights, had made a settlement of her property either on a third person, being a volunteer, or on herself for her separate use, the husband could have the settlement set aside (*Strathmore* v. *Bowes*, 1789, 1 White and Tudor's *Leading Cases*, 7th ed., p. 613; 1 R. R. 76). The question has now ceased to be of any practical importance, as marriage confers no rights upon the husband in his wife's property during her life.

(*c*) *After his Wife's Death.*—The principal rights to which a husband is entitled in his wife's property after her death are—(1) his right by the CURTESY (*q.v.*), and (2) his right to administer to her estate. By the Statute

of Frauds (29 Car. II. c. 3), sec. 25, it was enacted that the Statute of Distributions (22 & 23 Car. II. c. 10) should not extend to the estates of *femes covert* that should die intestate, but that their husbands might demand and have administration of their rights, credits, and other personal estates, and recover and enjoy the same as they might have done before the making of the Act. The separate estate of married women devolved on their death intestate in the same way as if it had not been settled to their separate use; and the Married Women's Property Acts have made no alteration in this respect (*In re Lambert's Estate*, 1888, 39 Ch. D. 626; *Surman* v. *Wharton*, [1891] 1 Q. B. 491; *Hope* v. *Hope*, [1892] 2 Ch. D. 336); and so this right of the husband still remains. But its value is greatly diminished by the wide powers which married women now possess of disposing of their separate property whether by act *inter vivos* or by will, and an intestacy is now a much more uncommon occurrence. As no property acquired by a wife since the Married Women's Property Act of 1882 vests in her husband, he will probably have to take out administration in order to entitle him to such property, whatever be its nature, chattels personal as well as real or choses in action. The term "next-of-kin" does not include a husband (*Milne* v. *Gilbert*, 1854, 5 De G., M. & G. 510). If the parties are judicially separated, property acquired by the wife during the separation devolves on her death intestate as if her husband were dead (20 & 21 Vict. c. 85, ss. 25, 26). And if a wife deserted by her husband obtains a protection order, the same applies to property acquired by her during the continuance of the order (20 & 21 Vict. c. 85, s. 21). If the marriage is dissolved by a decree of divorce all rights under the marriage are at an end, including the husband's right to administer with regard to any property acquired by the wife before or after the date of the decree *nisi* (*Wilkinson* v. *Gibson*, 1867, L. R. 4 Eq. 162; *Prole* v. *Soady*, 1868, L. R. 3 Ch. 220).

3. Powers of Appointment.

A married woman, however, could always, without the concurrence or other assistance of her husband, execute a power of appointment, whether the subject of the power was real or personal estate, and whether the power were general or limited, collateral, or annexed to an estate or interest (*Lady Travel's* case, cited 3 Atk. 711; *Peacock* v. *Monk*, 1750, 2 Ves. 191; *Doe d. Blomfield* v. *Eyre*, 1848, 5 C. B. 713; *Downes* v. *Timperon*, 1828, 4 Russ. 334; *Wood* v. *Wood*, 1870, L. R. 10 Eq. 220). Coverture itself imposed no disability in this respect; and by assuring real property to such uses as a married woman should by deed or will appoint, a settlor practically gave her the entire control over it apart from her husband (*Doe d. Blomfield* v. *Eyre*, 1848, 3 C. B. 557). The wife's real estate not settled to her separate use might, by a conveyance acknowledged by her and concurred in by her husband, be settled to such uses as she should appoint (*Pride* v. *Bubb*, 1871, L. R. 7 Ch. 64). And so, it would seem, could her reversionary personalty. She may appoint to her husband under a general power (*In re Pinede*, 1879, 12 Ch. D. 667), even if she be an infant (*In re D'Angibau*, 1879, 15 Ch. D. 228), if that be the settlor's intention (*In re Cardross*, 1878, 7 Ch. D. 728). The executors of her will, made under a power of appointment, take as appointees and not as representatives (*Tugman* v. *Hopkins*, 1842, 4 M. & G. 389). Nevertheless general probate is granted of such a will (*In the Goods of Gunn*, 1884, 9 P. D. 242).

By sec. 77 of the Fines and Recoveries Act a married woman could, by deed acknowledged with her husband's concurrence, release or extinguish any power of appointment over lands of any tenure or money to be invested in

land. And Malins' Act contained a similar provision with respect to powers over reversionary personalty.

By the Settled Estates Act, 1877, a married woman may apply to the Court to exercise the powers conferred by that Act; but before granting the application the Court used as a rule to require that she should be separately examined (s. 50; *In re Halliday's Settled Estates*, 1871, L. R. 12 Eq. 199; *In re Marshall's Settled Estates*, 1872, L. R. 15 Eq. 66). This is not now necessary in cases to which the Married Women's Property Act, 1882, applies (*In re Harris's Settled Estates*, 1884, 28 Ch. D. 171).

Under the Settled Land Act, 1882 (45 & 46 Vict. c. 38, s. 61), a married woman with separate property, or property settled to her separate use, has the power of a tenant for life; otherwise she and her husband have those powers. As the wife may execute, make, and do all deeds, instruments, and things necessary or proper for giving effect to the provisions of this section, it would seem that no acknowledgment is necessary. Where a married woman is tenant for life a restraint on anticipation does not interfere with her exercise of these powers (s. 1, subs. 6).

By the Conveyancing Act, 1881 (44 & 45 Vict. c. 41, s. 40 (1)), a married woman may appoint an attorney by deed to execute any deed or do any act which she might herself execute or do. By sec. 52, subs. (1), anyone to whom a power is given may by deed release the power; whether this enables women to release powers without acknowledging the deed of release is doubtful.

4. Separate Property.

The rules of the common law were too rigorous to prevail in a modern community, and a means was found of settling property so that the wife should have the benefit of it exclusive of her husband. The practice is of modern date. An account of its origin and development will be found in Hayne's *Outlines of Equity*, 2nd ed., pp. 202 *et seq.* Separate maintenance, from which it is derived, was known in the reign of Elizabeth. The next step was a trust in a marriage settlement of a term of years for the benefit of the wife (see Bridgman's *Precedents*, vol. ii. p. 60 (1710)), probably devised about the year 1660. In *Gore* v. *Knight*, 1705, 2 Vern. 535, Lady Gore had reserved in her marriage settlement a power to dispose of her estate by deed or will. From this the modern practice arose of conveying or assigning property real or personal by deed or will to trustees in trust for a married woman for her separate use. The legal estate was in the trustees, the separate use being an equitable estate. After many years of doubt and hesitation it was decided by the Courts of Equity that the effect of such a disposition was to give the married woman the same power of disposition over the property so settled that a *feme sole* has over her property. This principle was applied to personal property (*Fettiplace* v. *Gorges*, 1789, 1 Ves. Jun. 46; 1 R. R. 79; 3 Bro. C. C. 8) whether in possession or reversion (*Sturgis* v. *Corp*, 1806, 13 Ves. 190; 9 R. R. 169), and also real property (*Taylor* v. *Meads*, 1865, 4 De G., J. & S. 597), which it was held might be disposed of by will or deed without acknowledgment and without the husband's concurrence. For the whole interest in the property lies between the married woman and her trustees, and the whole theory of her alienation is that any instrument, be it deed or writing, when signed by her, operates as a direction to the trustees to convey or hold the estate according to the new trust created by such direction. This is sufficient to convey the married woman's equitable interest, and when the trust thus created is clothed by the trustees with the legal estate the alienation is complete both

at law and in equity (*Taylor* v. *Meads, ubi supra.*). Property settled as above was separate estate during coverture; during widowhood it was enjoyed as by a *feme sole*; but on any subsequent coverture, unless otherwise provided by the settlor, it became separate estate again (*Tullett* v. *Armstrong*, 1838, 1 Beav. 1). Though advisable, it was not essential that the property should be conveyed to trustees. It might be conveyed directly to the married woman for her separate use. Her husband then took the legal estate *jure mariti* in trust for his wife for her separate use (*Bennet* v. *Davis*, 1725, 2 P. Wms. 316; *Newlands* v. *Paynter*, 1839, 10 Sim. 377; 4 Myl. & Cr. 408).

No particular form of words was necessary to create a separate use, provided there was a clear unequivocal intention of the donor to give the married woman the whole benefit of the property free from the control and interference of her husband. The words "separate use," "sole and separate use," have been held to express such an intention; and other cases in which the trust has been held to be sufficiently created will be found in the notes to *Hulme* v. *Tenant*, 1778, 1 White and Tudor's *Leading Cases*, 7th ed., p. 654. But the intention may be gathered from other indications besides the words; *e.g.* the object of the gift, or the nature of the property, or the character of the instrument in which the settlement is created (see as to the difference between a marriage settlement and sale for this purpose, *Massy* v. *Rowan*, 1869, L. R. 4 H. L. 288). The fact that the instrument under which a wife claimed contained a clause against anticipation has been held not sufficient to create a separate use in the property (*Baggett* v. *Meux*, 1844, 1 Coll. 138; *Stogdon* v. *Lee*, [1891] 1 Q. B. 661), but in a settlement made since 1882 the case would probably be different. Again, if property was settled to a wife for life for her separate use, and after her death to such persons as she should by deed appoint, such property was held to be to all intents and purposes her separate estate; *à fortiori*, if the power of appointment was by deed or will; and still more if in default of appointment the property was settled to her heirs and assigns, or her executors, administrators, and assigns. If the power of appointment be by will only it was formerly doubtful whether the property was effectually settled to her separate use (*Johnson* v. *Gallagher*, 1861, 3 De G., F. & J. 517). At the present day the married woman, by releasing the power of appointment, would become absolutely entitled; and so far as her creditors are concerned, sec. 4 of the Married Women's Property Act of 1882 expressly provides that the execution of a general power by will by a married woman shall have the effect of making the property appointed liable for her debts and other liabilities in the same manner as her separate estate is made liable under that Act.

Property purchased by a wife out of her separate estate retains the nature of separate estate (*Duncan* v. *Cashin*, 1875, L. R. 10 C. P. 554). Savings out of the wife's separate allowance, if the parties are living apart, are her separate property (*Lady Tyrrel's* case, 1674, Freem. K. B. 304; *Brooke* v. *Brooke*, 1858, 25 Beav. 342; *In the Goods of Tharp*, 1878, 3 P. D. 76), *secus* of savings out of her household allowance if the parties are living together (*Lady Tyrrel's* case, *ubi supra*; *Barrack* v. *M'Culloch*, 1856, 3 Kay & J. 110).

A husband could always transfer property to a trustee for his wife, or constitute himself a trustee for her, and the property would then be her separate estate. Whether he had done so in any particular case was often a question of considerable difficulty (*Parker* v. *Lechmere*, 1879, 12 Ch. D. 256; *Barrack* v. *M'Culloch*, 3 Kay & J. 110; *Ex parte Whitehead*, 1885, 14 Q. B. D. 419). In the days when husband and wife were one person, and the husband could not therefore make a gift to his wife direct, it was a

great question whether Courts of Equity would construe a husband's attempted gift as a declaration of trust for the separate use of his wife (*Grant* v. *Grant*, 1865, 34 Beav. 623; *Fox* v. *Hawkes*, 1880, 13 Ch. D. 822; *In re Breton*, 1881, 17 Ch. D. 416, *per contra*). As a husband can now make a gift direct to his wife the question is unimportant from this point of view. If a husband allows his wife to make a profit out of some department of the household, any savings thereout are her separate property (*Slanning* v. *Style*, 1734, 3 P. Wms. 337; *Mews* v. *Mews*, 1852, 15 Beav. 529); and the goodwill, stock in trade, and earnings of a married woman which she carried on separately from her husband with his assent were, and are still, her separate estate (*Ashworth* v. *Outram*, 1877, 5 Ch. D. 923).

The first recognition by the legislature of the remedial doctrine of the separate use was the Divorce Act, 1857 (20 & 21 Vict. c. 85), sec. 21, under which a wife deserted by her husband may apply for an order to protect any money or property which she may acquire by her own "lawful" industry, or property which she may become possessed of after such desertion, against her husband; and the Court, if satisfied that the desertion was without reasonable cause, and that the applicant is maintaining herself by her own industry or property, may make an order protecting her earnings and property acquired since the commencement of the desertion. The effect of the order is that the wife is during the desertion in the like position in all respects with regard to property as she would be if she had obtained a decree of judicial separation, *i.e.* in the position of a *feme sole*. The protection order does not protect profits made in carrying on an immoral trade (*Mason* v. *Mitchell*, 1865, 3 H. & C. 528). By secs. 25 and 26 of the same Act the same provision applies to a woman judicially separated from her husband.

By secs. 7 and 8 of an Act passed in the following year similar provisions were applied to property in remainder and reversion, and to property to which the wife became entitled as trustee, executrix, or administratrix.

A reversion falling in during a judicial separation or protection order is covered by the Act, though the title to it accrued before (*In re Insole*, 1865, L. R. 1 Eq. 470; s. 8; *In re Emery's Trusts*, 1884, 50 L. T. 197). The wife is, and the husband is not, entitled to reduce choses in action into possession (*Johnson* v. *Lander*, 1869, L. R. 7 Eq. 228). But it seems that this Act does not affect a restraint on anticipation (*Waite* v. *Morland*, 1888, 38 Ch. D. 135).

The effect of a return to cohabitation seems to be different according as it occurs after (1) a judicial separation; (2) a protection order. In the former case property acquired during the separation remained separate property after the return to cohabitation (20 & 21 Vict. c. 85, s. 25; *In re Emery's Trusts*, 1884, 50 L. T. 197), but in the latter case, so far as the Divorce Acts operate, property acquired during the desertion only remains separate property during the continuance of the protection order (*Ewart* v. *Chubb*, 1875, L. R. 20 Eq. 454).

The Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), was the next enactment on this subject. By sec. 1 the wages and earnings acquired by any married woman after the 9th of August 1870, in any employment, occupation, or trade carried on by her separately from her husband and also any money or property acquired by her through the exercise of any literary, artistic, or scientific skill, and all investments of such wages, earnings, money, or property, shall be deemed and be taken to be property held and settled to her separate use, independent of any

husband to whom she may be married, and her receipts alone shall be a good discharge for the same. The words "separately from her husband" have raised most discussion. They mean, without the interference of the husband (*Laporte* v. *Costick*, 1874, 23 W. R. 131; *Ashworth* v. *Outram*, 1877, 5 Ch. D. 923; *Lovell* v. *Newton*, 1878, 4 C. P. D. 7; *In re Dearmer*, 1886, 53 L. T. 905). On the other hand, a benevolent assistance is not interference (*Ashworth* v. *Outram*, *ubi supra*). It is in each case a question of fact whether the trade is the separate trade of the wife. The same words in sec. 2 of the Act of 1882 (below) have the same meaning. Deposits in savings banks and annuities granted by the Commissioners for the reduction of the National Debt in the name of a married woman (s. 2); any sum not less than £20 forming part of the public stocks and funds in the name of any married woman (s. 3); fully paid-up shares or stock registered in the name of a married woman (s. 4); any share or claim in any industrial, provident, friendly, benefit, building, or loan society, to the holding of which no liability is attached, entered on the books of the society in the name of any married woman (s. 5);—all these were by that Act made her separate property unless the husband or his creditors were defrauded (ss. 2–6). By sec. 7, women married after the 9th of August 1870, who should during marriage *become entitled* to any personal property as next-of-kin, or one of the next-of-kin of an intestate, or to any sum of money *not exceeding* £200 under any deed or will, held the same, without prejudice, to any settlement affecting the same, to their separate use. The words "become entitled" have been construed to mean, "become entitled in possession" (*Lane* v. *Oaks*, 1874, 30 L. T. N. S. 726). The limit of £200 applies only to any sum of money under any deed or will (*King* v. *Voss*, 1884, 13 Ch. D. 504). Several legacies, each less than £200, but exceeding that amount in the aggregate, would seem to be her separate property under this section (*In re Middleton's Will*, 1868, 16 W. R. 1107; *Bower* v. *Smith*, 1871, L. R. 11 Eq. 279).

By sec. 8 it was enacted that the rents and profits of any freehold, copyhold, or customary-hold property descending upon any woman married after the 9th of August 1870 as heiress or co-heiress of an intestate should belong, subject to any settlement affecting the same, to her for her separate use. The "rents and profits" do not involve the corpus (*Johnson* v. *Johnson*, 1887, 35 Ch. D. 345).

Sec. 9 provided how questions between husband and wife as to separate property under that Act were to be dealt with.

By sec. 10 a married woman might effect a policy of insurance upon her own life, or the life of her husband for her separate use. Further, a policy of insurance effected by any married man on his own life, and expressed on the face of it to be for the benefit of his wife, or his wife and children, or any of them, was declared to be a trust for the benefit of the wife for her separate use, and of his children, or any of them as expressed; saving the rights of the husband's creditors to premiums paid by him in fraud of them. (As to the interest taken in the fund by the wife and children, see *In re Seyton*, 1886, 34 Ch. D. 511; *In re Davies' Policy Trusts*, [1892] 1 Ch. 90.)

The Act of 1870, however remedial as far as it extended, was only a tentative enactment. The decisive step was taken by the Act of 1882 (45 & 46 Vict. c. 75). The provisions of that Act as to the separate property of a married woman are as follows. By sec. 1, subs. (1), a married woman shall, in accordance with this Act, be capable of acquiring, holding, and disposing, by will or otherwise, of any real or personal property as her

separate property in the same manner as if she were a *feme sole*, without the intervention of any trustee. (Subsecs. 2, 3, 4, and 5 of s. 1 relate to the capacity of contracting, suing and being sued, and liability to the bankruptcy laws; these enactments are dealt with below.) By sec. 2 every woman who marries after the commencement of this Act (1st January 1883, s. 25) shall be entitled to have and to hold as her separate property, and to dispose of in manner aforesaid, all real and personal property which shall belong to her at the time of marriage, or shall be acquired by or devolve upon her after marriage, including any wages, earnings, money, and property gained or acquired by her in any employment, trade, or occupation in which she is engaged, or which she carries on separately from her husband, or by the exercise of any literary, artistic, or scientific skill.

(Sec. 3 deals with loans made by wife to husband of money, etc., to be used in his trade; and sec. 4, with the rights of creditor in a fund over which a married woman has a general power of appointment by will. These sections will be dealt with later.)

Sec. 5 enacts that every woman married before the commencement of this Act shall be entitled to have and to hold and to dispose of in manner aforesaid as her separate property all real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after the commencement of this Act, including any wages, earnings, money, and property so gained or acquired by her as aforesaid. It is to be observed that this section refers to women married before the Act. Property, their title to which "shall accrue" after the Act, is their separate property. A reversionary interest to which a married woman was entitled before the Act, but which falls into possession after the Act, is not property her title to which accrues after the Act (*Reid* v. *Reid*, 1886, 31 Ch. D. 402). But where a married woman became entitled, after the passing of the Act, under the will of a testator who died before that date, to a sum bequeathed to such person as should be his next-of-kin on the happening of an event, it was held that her title first accrued on the happening of the event, for a mere *spes successionis* is not a title (*In re Parsons*, 1890, 45 Ch. D. 51).

The four following sections (6–9) supersede and extend the sections 2–5 of the Act of 1870. The 6th section deals with deposits, stocks, etc., which were at the commencement of the Act standing in the sole name of a married woman, and provides that "All deposits in any post office or other savings bank, or in any other bank, all annuities granted by the Commissioners for the reduction of the National Debt, or by any other person, all sums forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Governor and Company of the Bank of England, or of any other bank, which at the commencement of the Act are standing in the sole name of a married woman, and all shares, stock, debentures, debenture stock, or other interests of or in any corporation, company, or public body, municipal, commercial, or otherwise, or of or in any industrial, provident, friendly, benefit, building, or loan society, which at the commencement of this Act are standing in her name, shall be deemed, unless and until the contrary be shown, to be the separate property of such married woman; and the fact that any such deposit, annuity," etc., "is standing in the sole name of a married woman shall be sufficient *primâ facie* evidence that she is beneficially entitled thereto for her separate use, so as to authorise and empower her to receive and transfer the same, and to receive the dividends, interest, and profits thereof, without the concurrence of her husband, and to indemnify the Postmaster-General, the Commissioners

for the Reduction of the National Debt, the Governor and Company of the Bank of England, the Governor and Company of the Bank of Ireland, and all directors, managers, and trustees of every such bank, corporation, company, public body, or society as aforesaid in respect thereof."

Sec. 8 applies the same provisions "so far as relates to the estate, right, title, or interest of the married woman," to deposits, etc., which at the commencement of the Act were standing in the name of a married woman jointly with any persons or person other than her husband. And sec. 9 renders it unnecessary for the husband of any married woman, in respect of her interest, to join in the transfer of any deposit, etc., which at the commencement of the Act was standing in her sole name, or in the joint names of herself and any other persons or person other than her husband.

Secs. 7–9 make provisions for such deposits, stocks, etc., being transferred into the sole name of a married woman, or into her name jointly with a stranger. Sec. 7 enacts that all such deposits, etc., "which after the commencement of this Act shall be allotted to, or placed, registered, or transferred in or into, or made to stand in, the sole name of any married woman, shall be deemed, unless and until the contrary be shown, to be her separate property, in respect of which, so far as any liability may be incident thereto, her separate estate shall alone be liable, whether the same shall be so expressed in the document whereby her title to the same is created or certified, or in the books or register whereon her title is entered or recorded, or not. Provided always that nothing in this Act shall require or authorise any corporation or joint-stock company to admit any married woman to be a holder of any shares or stock therein to which any liability may be incident, contrary to the provisions of any Act of Parliament, charter, by-law, articles of association, or deed of settlement, regulating such corporation or company." The 8th section also extends the provisions of the 7th to the case of such deposits, etc., being after the commencement of the Act allotted to, etc., or made to stand in the name of any married woman jointly with any person or persons other than her husband. And the 9th section dispenses with the necessity of the husband's concurrence in a transfer by her in respect of her interest. In all these cases the stocks, etc., are only deemed to be the separate property of the married woman in whose name they stand "unless and until the contrary be shown." Where the father of a married woman applied for shares in her name for his own benefit, her name was taken off the register and the father's name substituted (*In re Hercules Insurance Co.*, 1872, 13 Eq. 566). Even, however, before the passing of the Act a married woman could effectually contract to take shares in a company provided there was nothing in the deed of settlement or memorandum or articles of association excluding married women from becoming shareholders, and she could be ordered to be placed on the list of contributories in respect of her separate estate (*Mrs. Matthewman's* case, 1867, L. R. 3 Eq. 781).

The 11th section supersedes sec. 10 of the Act of 1870, and provides that a wife may insure her own or her husband's life for her separate use by virtue of her power to contract conferred on her by earlier sections (see below), and that the policy and all the benefit thereof shall enure accordingly. By sec. 24 "property" includes "chose in action."

The following is a short summary of the other sections of the Act, most of which are dealt with at greater length below. Sec. 12 confers on married women remedies for the protection and security of their separate property; secs. 13, 14, and 15 refer to antenuptial debts; sec. 16 subjects the

wife to certain criminal proceedings; sec. 17 provides for the settlement of questions between husband and wife as to property; sec. 18 deals with a married woman who is a trustee or executrix; sec. 19 saves existing settlements; secs. 20 and 21 render a married woman having separate property liable to maintain her husband and children; sec. 22 repeals the Act of 1870 above mentioned and the Act of 1874 mentioned below, saving, however, rights already acquired under those Acts. By sec. 23 the legal personal representative of a married woman is clothed with the same rights and liabilities as she would have been if living. The Act came into operation on the 1st of January 1883 (s. 25), and does not extend to Scotland (s. 26).

Before this Act a married woman could leave by will all her separate property which belonged to her at the time of her death where she died in the lifetime of her husband, or, if she survived him, all such property as she died possessed of, and which had been her separate property during the marriage (*Willock* v. *Noble*, 1875, L. R. 7 H. L. 580). And even after the Act property acquired by a woman after the death of her husband did not pass by her will made during coverture, because such property, not having been acquired or enjoyed during marriage, was not separate property (*In re Cuno*, 1889, 43 Ch. D. 12; *King* v. *Lucas*, 1883, 23 Ch. D. 712; *In re Shakespear*, 1885, 30 Ch. D. 169). In order that her will might pass such property it had to be re-executed and republished, whether made before (*Willock* v. *Noble*, 1875, L. R. 7 H. L. 580) or after (*In re Price*, 1885, 28 Ch. D. 709) the Act (see also *In re Bowen*, [1892] 2 Ch. 291). But now by sec. 3 of the Married Women's Property Act, 1893, "sec. 24 of the Wills Act, 1837, shall apply to the will of a married woman made during coverture, whether she is or is not possessed of or entitled to any separate property at the time of making it, and such will shall not require to be re-executed or republished after the death of her husband." Her will made during marriage will now therefore pass all disposable property to which she dies entitled. This section applies to every will of a married woman who dies after the date of the Act (5th December 1893) (*In re Wylie*, [1895] 2 Ch. 116).

Formerly, if a gift or grant were made to husband and wife they took not by moieties but by entireties (*Doe* v. *Parratt*, 1794, 5 T. R. 652). Probably they would now take by moieties (*In re Dixon*, 1889, 42 Ch. D. 306).

5. Restraint on Anticipation.

But the separate use, although it was described by James, L.J., as a "blessed word and thing" (*Ashworth* v. *Outram*, 1880, 5 Ch. D. 923), was not always sufficient to secure the wife in the enjoyment of her property from her husband's influence. To protect her more effectually conveyancers added to the words creating the separate use further words restraining the free power of disposing of the property, and tradition credits Lord Thurlow with the invention (*Parker* v. *White*, 1805, 11 Ves. 221; *Jackson* v. *Hobhouse*, 1817, 2 Mer. 487; 16 R. R. 200). The ordinary form of the clause directs payment of the income to the wife "for her separate use, and so that the said (wife) shall not have power to deprive herself of the benefit thereof by sale, mortgage, charge, or otherwise in the way of anticipation, and that her receipts only shall be effectual discharges for the same." A shorter form in common use gives the property "to the said (wife), so that the same shall be for her separate use without power of anticipation." Of course in a gift to a man such a clause would be utterly void, and Lord Thurlow himself only upheld it in his later days. Lord Alvanley followed and recognised its validity. Lord Eldon in his day said it was too late to question it.

Once the Courts had decided that in case of a married woman the restraint could be legally imposed, the question whether it had been imposed in any given case became one of the construction of the instrument purporting to impose it. No particular words are necessary. A gift of property "not to be sold or mortgaged" (*Steedman* v. *Poole*, 1847, 6 Hare, 193), or of stock "without liberty to sell or assign during her life" (*Baker* v. *Newton*, 1839, 2 Beav. 112), or a gift "to her sole and inalienable use" (*Harrison* v. *Harrison*, 1888, 13 P. D. 180), and, generally, any form of words which show that a settlor or testator intends to deprive a married woman of power to alienate or anticipate, will create a restraint on anticipation (*In re Bown, O'Halloran* v. *King*, 1883, 27 Ch. D. 411; *In re Grey's Settlement*, 1887, 34 Ch. D. 712). A restraint on anticipation is the same in effect as a restraint on alienation (*In re Currey*, 1886, 32 Ch. D. 361). There is a wide difference in effect between the restraint on anticipation and the cesser of an interest on bankruptcy or alienation. In the latter case an attempted alienation vests the property in the next beneficiary (*In re Dugdale*, 1888, 38 Ch. D. 176); in the former it has no effect on the property. A sum of money may be granted or bequeathed to a married woman without power of anticipation (*In re Currey, Gibson* v. *Way*, 1886, 32 Ch. D. 361). Whether these words prevent the executors or trustees from paying the money over to the married woman is a question of construction, and the use of the words "with restraint on anticipation" is not conclusive if a contrary intention appears notwithstanding those words (*In re Bown, ubi supra; In re Grey's Settlement, ubi supra*). The nature of the fund may be considered in deciding this question (*In re Ellis's Trusts*, 1874, L. R. 17 Eq. 409).

If a fund be so given subject to a prior interest, the restraint is not necessarily confined to the continuance of the prior interest (*In re Tippett and Newbold*, 1888, 37 Ch. D. 444). Property may be so settled that a married woman has no power to deal with either corpus or income by way of anticipation; or the corpus may be fettered leaving the income free (*Cooper* v. *Macdonald*, 1877, 7 Ch. D. 283); or there may be a restraint upon anticipation of the income, together with a power of appointment over the corpus to take effect after the death of the married woman (*Alexander* v. *Young*, 1848, 6 Hare, 393; *Hodges* v. *Hodges*, 1882, 20 Ch. D. 749; *Skinner* v. *Todd*, 1881, 51 L. J. Ch. 198). It has been suggested that there is something inconsistent in limiting a life estate to a married woman without impeachment of waste, and yet without power of anticipation (*Clive* v. *Clive*, 1872, L. R. 7 Ch. 433), *sed quære de hoc* (*In re Lumley*, [1896] 2 Ch. 690). The restraint on anticipation only operates during marriage, being only a modification of the separate use. Once the object of the clause becomes discovert, she is as free to dispose of the property as a *feme sole* (*In re Wood*, 1889, 61 L. T. 197); but if and so far as the property is not disposed of, on any subsequent marriage the restraint will revive again (*Tullett* v. *Armstrong*, 1838, 1 Beav. 1), unless imposed for a limited time. In former days the Courts leaned towards the construction that the restraint was only imposed during the intended or then existing coverture, but in later days it has been held that a gift to a married woman for life with restraint on anticipation will make the restraint revive on any subsequent coverture (*Hawkes* v. *Hubback*, 1870, L. R. 11 Eq. 5), unless a particular coverture be aimed at (*Moore* v. *Morris*, 1857, 4 Drew. 33). The old rule that it required clear words to deprive a husband of his legal rights in his wife's property will, it is thought, not survive the Married Women's Property Act, 1882, which has abolished the *jus mariti*. The intention that the restraint should revive on subsequent covertures will therefore be

more readily inferred. Moreover, all property to which that Act applies being separate property, it is no longer necessary, though it is still usual, to settle property to the separate use as a basis whereon to lay the restraint on anticipation (*In re Lumley*, [1896] 2 Ch. 690).

As may be gathered from the form of the clause, the effect of the restraint on anticipation is to prevent the married woman from dealing so long as the restraint lasts with any part of the property except income actually due and payable (*In re Brettle*, 1864, 2 De G., J. & S. 79). If the subject of the settlement be real estate she cannot sell or incumber (*Baggett* v. *Meux*, 1844, 1 Coll. 138; 1 Ph. Ch. 627), or even lease it (*Steedman* v. *Poole*, 1847, 6 Hare, 193). A covenant to settle after-acquired property does not include property subject to restraint on anticipation (*In re Sarel*, 1864, 10 Jur. N. S. 876).

As it is the gift of the settlor which decides how the property is to be dealt with, it is clear that the parties to the marriage cannot get rid of the restraint, and the power of the Court (except under sec. 39 of the Conveyancing Act, 1881, mentioned below) was equally unavailing, even where the grossest fraud had been perpetrated by the married woman on a *bonâ fide* purchaser for value (*Stanley* v. *Stanley*, 1877, 7 Ch. D. 589; *Hood Barrs* v. *Cathcart*, [1894] 2 Q. B. 559). The restraint on anticipation can, however, be got rid of by sec. 39 of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), which enacts that notwithstanding that a married woman is restrained from anticipation the Court may, if it thinks fit, where it appears to the Court to be for her benefit, by judgment or order, with her consent, bind her interest in any property. The benefit of the married woman (*Hodges* v. *Hodges*, 1882, 20 Ch. D. 749), not that of her, or her husband's, creditors (*In re Poilard's Settlement*, [1896] 2 Ch. 532), is what it considers. See further, *In re Jordan*, 1886, 55 L. J. Ch. 330; *In re Currey*, 1887, 56 L. J. Ch. 389; *In re C.'s Settlement*, 1887, 56 L. J. Ch. 556; *In re Milner's Settlement*, [1891] 3 Ch. 547; *In re Pollard's Settlement*, [1896] 2 Ch. 552. The application is usually made by summons in chambers, and the separate examination of the applicant is generally necessary (*Liliewall's Trusts*, 1882, 30 W. R. 243; *Hodges* v. *Hodges*, 1882, 20 Ch. D. 749). A restraint on anticipation does not preclude a married woman from exercising the powers of a tenant for life under the Settled Estates Act, 1877, and Settled Land Act, 1882.

In the days when a married woman could not execute a power of attorney, it was held that trustees could not pay over to her attorney the income of property which she was restrained from anticipating (*Kenrick* v. *Wood*, 1869, L. R. 9 Eq. 333). Now, however, this is otherwise (Conv. Act, 1881, s. 40 (1); *Stewart* v. *Fletcher*, 1888, 38 Ch. D. 627).

By sec. 19 of the Married Women's Property Act, 1882, nothing in the Act contained . . . shall interfere with or render inoperative any restriction against anticipation attached or to be attached to the enjoyment of any property or income by a woman under any settlement, agreement for a settlement, will, or other instrument; but no restriction against anticipation contained in any settlement or agreement for a settlement of a woman's own property to be made or entered into by herself shall have any validity against debts contracted by her before marriage, and no settlement or agreement for a settlement shall have any greater force or validity against creditors of such woman than a like settlement or agreement for a settlement made or entered into by a man would have against his creditors. The general effect of this section, so far as it concerns the restraint on anticipation, appears to be this: where a settlement of his own property made by a man would be

void as against his creditors, there a settlement made by a woman of her own property, whether or not she imposes a restraint on anticipation, shall be void against her creditors; further, if a woman makes a settlement of her own property in other respects valid as against creditors, but containing a restraint on anticipation, it shall be, *quoad* the restraint invalid as against antenuptial creditors; and lastly, in other respects the restraint on anticipation shall not be affected by the Act.

The subject will have to be further considered with reference to contracts by married women before and after marriage (see below); but it may be observed here that by sec. 45 of the Trustee Act, 1893 (56 & 57 Vict. c. 53), where a trustee commits a breach of trust with the consent in writing of a beneficiary, the High Court may, if it thinks fit, make an order impounding the interest of the beneficiary by way of indemnity to the trustee, notwithstanding a restraint on anticipation. But the Court will be slow to exercise this power where a trustee knowingly commits a breach of trust (*Bolton* v. *Curre*, [1895] 1 Ch. 544).

6. Gifts between Husband and Wife.

A wife could always dispose, by gift or otherwise, of her separate property corpus or income, unless restrained from anticipation, to her husband as well as to a stranger. No separate examination was necessary to the validity of the gift (*Pawlet* v. *Delaval*, 1735, 2 Ves. 669) unless the donee had to apply to the Court (*Milnes* v. *Busk*, 1794, 2 Ves. 488). When a purchase or transfer of stock is made or taken by the one in the name of the other, it is a question, and often a difficult question, of intention, having regard to all the surrounding circumstances, whether a gift or a resulting trust for the donor is the true inference to be drawn (*Marshall* v. *Crutwell*, 1875, L. R. 20 Eq. 328). Where the investment is made by the husband in the wife's name, a gift is *primâ facie* intended; but this presumption may be rebutted (*ibid.*). If the parties are not legally married, the presumption is in favour of a resulting trust (*Soar* v. *Foster*, 1858, 4 Kay & J. 152). An investment by a wife of her separate property in her husband's name generally implies a resulting trust and not a gift (*Green* v. *Cartill*, 1877, 4 Ch. D. 882; *In re Curtis*, 1885, 52 L. T. 244). Where property was purchased by a husband partly out of the wife's separate estate, it was held that the latter had a lien upon the property to the extent of her share of the purchase money (*Seales* v. *Baker*, 1859, 28 Beav. 91). Where the whole purchase money was advanced by the wife, she was held entitled to the whole property as against the husband's devisee (*Darkin* v. *Darkin*, 1853, 17 Beav. 578). Money expended by the one on permanent improvements on the property of the other generally enures to the benefit of the owner of the property, unless expended under a mistake, in which case the one who expends the money has a lien for the amount expended (*Neesom* v. *Clarkson*, 1844, 4 Hare, 97), except when that one is the husband, and the wife is restrained from anticipation (*Wiles* v. *Cooper*, 1846, 9 Beav. 294). If husband and wife join in mortgaging the wife's estate to secure a loan to the husband, the wife is entitled to have her estate exonerated out of the husband's assets (*Hudson* v. *Carmichael*, 1854, Kay, 613). The wife in such cases is in the position of a surety for the husband's debt (*Fergusson* v. *Gibson*, 1872, L. R. 14 Eq. 379). It is a question of fact for whose use the money was raised (*Clinton* v. *Hooper*, 1790, 1 Ves. 173; 1 R. R. 102).

The wife may voluntarily, and as a free agent, permit her husband to receive the income or capital of her separate property, and apply it for

their common benefit, or even for the purposes of his business (*Beresford* v. *Archbishop of Armagh*, 1844, 13 Sim. 643). If so, a gift to the husband may be inferred, and the wife cannot claim an account against him (*Caton* v. *Rideout*, 1849, 1 Mac. & G. 599; *Edwards* v. *Cheyne*, 1888, 13 App. Cas. 385) or against her trustee (*Payne* v. *Little*, 1858, 26 Beav. 1). If the wife objects to her husband so applying her income, she must make a serious and positive demand that it should be paid into her own hands, or otherwise rebut the presumption of a gift (*Corbally* v. *Grainger*, 1854, 4 Ir. Ch. 173; *Ridout* v. *Lewis*, 1738, 1 Atk. 269), as by a subsequent separation (*Moore* v. *Moore*, 1737, 1 Atk. 272; *Dixon* v. *Dixon*, 1878, 9 Ch. D. 587), in which case the husband would be liable to refund all he had received after the demand or separation. What applies to income applies also to capital (*Gardner* v. *Gardner*, 1859, 1 Gif. 126), with this modification that the Court will not so readily infer a gift of capital as of income. The result of the authorities to the present time seems to be that in the case of capital the onus of proof of a gift lies upon the husband, and must be clearly established, otherwise he will be held a trustee for his wife. In the case of income the onus is on the wife to prove that her husband received it as a loan and not as a gift (*Alexander* v. *Barnhill*, 1889, 21 L. R. Ir. 511; and see *In re Flamank*, 1889, 40 Ch. D. 461, where the facts established a gift of income, but negatived a gift of capital). If the wife were incapable of assenting to her husband's receiving her income or capital, he would have to account for all he had actually received and applied otherwise than for her benefit (*A.-G.* v. *Parnther*, 1792, 4 Bro. C. C. 409; *Howard* v. *Digby*, 1834, 2 Cl. & Fin. 634). But where the circumstances are such that the wife's consent or acquiescence may fairly be inferred, the presumption of a gift arises on each receipt of income by the husband, and bars all claim on the part of the wife or her representatives. To displace the rule it is not sufficient to show that the wife's separate income has accumulated in the husband's hands and remains unspent (*Beresford* v. *Archbishop of Armagh*, 1844, 13 Sim. 643), or that the husband is himself trustee of the wife's separate income (*Caton* v. *Rideout*, 1849, 1 Mac. & G. 559), or that the wife is restrained from anticipation (*Rowley* v. *Unwin*, 1855, 2 Kay & J. 138; *Edwards* v. *Cheyne*, 1888, 13 App. Cas. 385).

Before the Act of 1882 a husband could not make a valid gift of a chattel at common law to his wife, because the wife could not have possession at law in her own right; therefore one of two courses had to be taken, either possession must have been given to a third person as trustee for the wife, or the husband must have constituted himself her trustee by a valid declaration of trust. If he purported to give to his wife direct, equity would not construe his efforts into a declaration of trust, and the attempted gift was void (*In re Breton's Estate*, 1881, 17 Ch. D. 416). A married woman may now have possession in her own right (*Ramsay* v. *Margrett*, [1894] 2 Q. B. 18). A gift of chattels either verbally or in writing, unless by deed, is imperfect if not accompanied by delivery actual or constructive of the thing given (*Cochrane* v. *Moore*, 1890, 25 Q. B. D. 57). In the case of a gift between husband and wife there is generally no actual delivery, and the chief difficulty arises therefore on the question whether there has been a constructive delivery. The conduct of the parties after the date of the alleged gift is often the only evidence available (see *Irons* v. *Smallpiece*, 1819, 2 Barn. & Ald. 551; 21 R. R. 395; *Winter* v. *Winter*, 1861, 9 W. R. 747). It is obvious that but for some statutory provision a man might find a ready means of defrauding his creditors by making gifts to his

wife. An attempt to protect creditors was made by sec. 10 of the Married Women's Property Act, 1882, which runs as follows: "Nothing in this Act contained shall give validity as against the creditors of the husband to any gift, by a husband to his wife, of any property which after such gift shall continue to be in the order and disposition or reputed ownership of the husband . . . ," *i.e.* of which he is allowed to retain possession under circumstances which give the reputation of ownership (*Lingham* v. *Biggs*, 1797, 1 Bos. & Pul. 82). It is a question of fact, subject to a proper direction, whether the property remains in the husband's order and disposition or reputed ownership, and it is thought that something beyond the mere fact that it remains in the residence occupied by both will have to be proved before that question can be left to the jury (*Ex parte Dorman*, 1872, L. R. 8 Ch. 51; *Ramsay* v. *Margrett*, [1894] 2 Q. B. 18). A gift of furniture, for example, by a husband to his wife which remains in their common residence can only be avoided by Statute 13 Eliz. c. 5. The 10th section continues to enact that nothing in the Act contained shall give validity "to any deposit or other investment of moneys of the husband made by or in the name of his wife in fraud of his creditors." A *bonâ fide* purchase by a wife from her husband is a perfectly valid transaction, and cannot be impeached by anyone (*Ramsay* v. *Margrett*, [1894] 2 Q. B. 18).

It is to be observed that there is nothing in the Married Women's Property Acts to invalidate a parol gift by a wife to her husband. The Statute of Elizabeth and the Bills of Sale Acts will, of course, apply to gifts of both husband and wife, and if the wife be a trader she will be subject to the Bankruptcy Acts (see below).

7. Antenuptial Liabilities.

At common law the husband by virtue of the marriage took upon himself the wife's liabilities. He was commonly said to have "married the debts." Yet this requires further definition. If a married woman were sued on an antenuptial debt or tort, she might, of course, let judgment go by default, and the plaintiff would recover a judgment against her personally in the ordinary form (*Poole* v. *Canning*, 1867, L. R. 2 C. P. 241); or she might neglect to plead coverture, which would lead to the same result (*Dillon* v. *Cunningham*, 1872, L. R. 8 Ex. 23); but she might plead coverture as a plea in abatement, and the plaintiff had then to amend his writ by adding the husband. The husband could not be sued alone (*Garrard* v. *Guibelei*, 1863, 13 C. B. N. S. 832), and upon the wife's death, unless judgment had been previously recovered against both, he was freed from all liability (Com. *Dig.* "Baron and Feme," 254), except as her administrator to the extent of assets in his hands. On the husband's death, if judgment had not been previously recovered, the widow became reinvested with the antenuptial liability (*Woodman* v. *Chapman*, 1808, 1 Camp. 189; 10 R. R. 666). The proper course for the plaintiff was to sue both husband and wife. He could recover a personal judgment against both, and take both in execution under a *capias*. Then, if the wife had no separate property, she was discharged; but if she had separate property, the Court would not order her discharge (*Scott* v. *Morley*, 1887, 20 Q. B. D. 120; *Ivens* v. *Butler*, 1857, 7 El. & Bl. 159; *Edwards* v. *Martin*, 1851, 17 Q. B. 693; *Fergusson* v. *Clayworth*, 1844, 6 Q. B. 269; *Larkin* v. *Marshall*, 1850, 4 Ex. 804). The bankruptcy and discharge of the husband after action brought against husband and wife for the wife's antenuptial obligations, discharged both at law of their liability; but, it seems, the wife's separate estate could in

equity be reached to satisfy such obligations (*Chubb* v. *Stretch*, 1870, L. R. 9 Eq. 555).

Such was briefly the law when the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), was passed. The only antenuptial liabilities with which it dealt were debts. From the wife's antenuptial debts this Act relieved the husband altogether, and enacted (s. 12) that the wife alone should be liable to be sued for, and any separate estate belonging to her should be liable to satisfy, such debts as though she had continued unmarried. The wife might be sued alone (*Williams* v. *Mercier*, 1882, 9 Q. B. D. 337), and the plaintiff might recover judgment without proving that the defendant had separate estate (*Downe* v. *Fletcher*, 1888, 21 Q. B. D. 11); but the married woman was not made personally liable on the judgment, the creditors' only remedy being an equitable remedy against her separate estate (*Ex parte Jones*, 1879, 12 Ch. D. 484); but this was liable although subject to restraint on anticipation (*Axford* v. *Reid*, 1889, 22 Q. B. D. 551).

The Act of 1870 enabled a woman to marry without a settlement and leave her creditors without a remedy, and therefore the Act of 1874 was passed. This statute repealed so much of the Act of 1870 as enacted that a husband should not be liable for the debts of his wife contracted before marriage, and provided (s. 1) that husband and wife might be jointly sued for any debt contracted, or for any tort committed, by the wife before marriage, or for the breaches of any contract made by the wife before marriage, and that the husband should be liable (s. 2) in respect of such matter to the extent of the following assets:—

(1) The value of the personal estate in possession of the wife which should have vested in the husband;

(2) The value of the choses in action of the wife which the husband should have reduced into possession, or which with reasonable diligence he might have reduced into possession;

(3) The value of chattels real of the wife which should have vested in the husband and wife;

(4) The value of the rents and profits of the real estate of the wife which the husband should have received, or with reasonable diligence might have received;

(5) The value of the husband's estate or interest in any property, real or personal, which the wife, in contemplation of her marriage with him, shall have transferred to him or to any other person;

(6) The value of any property, real or personal, which the wife, in contemplation of her marriage with her husband, shall with his consent have transferred to any person with the view of defeating or delaying her existing creditors (s. 5).

Provided that when the husband after marriage paid any debt of his wife, or had a judgment *bonâ fide* recovered against him in any such action as in this Act mentioned, then to the extent of such payment or judgment the husband should not in any subsequent action be liable. By sec. 2 the husband was enabled, in addition to other pleas, to plead that he was not liable in respect of assets. If he did not thus plead, he was taken to have confessed liability as far as assets were concerned. If it was not found that the husband had assets, he was entitled to judgment with costs, whatever were the result of the action against the wife (s. 3). When the liability of the husband was established, the judgment to the extent of the husband's liability was a joint judgment against husband and wife, and as to the residue, if any, of the amount recovered, a separate judgment

against the wife (s. 4). As under the Act of 1870, so under this Act, it was unnecessary to prove the existence of separate estate in order to recover judgment against the wife (*Downe* v. *Fletcher*, 1888, 21 Q. B. D. 11), and the liability on the judgment against her was not a personal but only a proprietary liability, and the judgment could only affect her separate estate, though that was liable whether free or subject to restraint on anticipation (*Downe* v. *Fletcher*, 1888, 21 Q. B. D. 11; *Axford* v. *Reid*, 1889, 22 Q. B. D. 551; *Scott* v. *Morley*, 1887, 20 Q. B. D. 120). If the wife died before action brought the husband escaped liability, for then there could be no joint judgment (*Bell* v. *Stocker*, 1882, 10 Q. B. D. 129).

The Act of 1882 repealed the Acts of 1870 and 1874 except as to rights and liabilities acquired and incurred under them. Sec. 13 of the Act of 1882 relates to a married woman's liability on her antenuptial obligations, and enacts that, "A woman after her marriage shall continue to be liable in respect and to the extent of her separate property for all debts contracted, and all contracts entered into or wrongs committed by her before her marriage, including any sums for which she may be liable as a contributory, either before or after she has been placed on the list of contributories, under and by virtue of the Acts relating to joint-stock companies; and she may be sued for any such debt, or for any liability for damages or otherwise under any such contract, or in respect of any such wrong; and all sums recovered against her in respect thereof, or for any costs relating thereto, shall be payable out of her separate property." Then follows a clause referring to her rights and liabilities as between herself and her husband in these words: "and, as between her and her husband, unless there be any contract between them to the contrary, her separate estate shall be deemed to be primarily liable for all such debts, contracts, or wrongs, and for all damages and costs recovered in respect thereof." And then the section continues, "Provided always that nothing in this Act shall operate to increase or diminish the liability of any woman married before the commencement of this Act for any such debt, contract, or wrong, as aforesaid, except as to any separate property to which she may become entitled by virtue of this Act, and to which she would not have been entitled for her separate use under the Acts hereby repealed or otherwise, if this Act had not passed." Sec. 14 deals with the husband's liability, and enacts that, "A husband shall be liable for the debts of his wife contracted, and for all contracts entered into and wrongs committed by her, before marriage, including any liabilities to which she may be so subject under the Acts relating to joint-stock companies as aforesaid, to the extent of all property whatsoever belonging to his wife which he shall have acquired, or become entitled to, from or through his wife, after deducting therefrom any payments made by him, and any sums for which judgment may have been *bonâ fide* recovered against him in any proceeding at law, in respect of any such debts, contracts, or wrongs, for or in respect of which his wife was liable before her marriage as aforesaid; but he shall not be liable for the same any further or otherwise; and any Court in which a husband shall be sued for any such debt shall have power to direct any inquiry or proceedings which it may think proper for the purpose of ascertaining the nature, amount, or value of such property." Then follows a proviso with regard to the husband's liability similar to that contained in the foregoing section, "Provided always that nothing in this Act contained shall operate to increase or diminish the liability of any husband married before the commencement of this Act, for or in respect of any such debt or other liability of his wife as aforesaid." Sec. 15 enacts that "A husband

and wife may be jointly sued in respect of any such debt or other liability (whether by contract or for any wrong) contracted or incurred by the wife before marriage as aforesaid, if the plaintiff shall seek to establish his claim, either wholly or in part, against both of them; and if in any such action, or in any action brought in respect of any such debt or liability against the husband alone, it is not found that the husband is liable in respect of any property of the wife so acquired by him, or to which he shall have become so entitled as aforesaid, he shall have judgment for his costs of defence, whatever may be the result of the action against the wife if jointly sued with him; and in any such action against husband and wife jointly, if it appears that the husband is liable for the debt or damages recovered, or any part thereof, the judgment to the extent of the amount for which the husband is liable shall be a joint judgment against the husband personally and against the wife as to her separate property; and as to the residue, if any, of such debt and damages the judgment shall be a separate judgment against the wife as to her separate property only."

A plaintiff therefore who seeks to enforce an antenuptial obligation of a married woman may sue the married woman herself (s. 13) and the husband (s. 14), one after the other (*Beck* v. *Pierce*, 1889, 23 Q. B. D. 316), judgment against one being no bar to proceedings against the other (*ibid.*); or he may sue them both together (s. 15), and get a joint judgment against both, execution being limited, in case of the wife, to her separate estate. There is some reason for thinking that the "joint judgment" mentioned in sec. 15 means a joint and several judgment. As to the husband's liability, the Statute of Limitations begins to run, not from the date of the marriage, but from the first accrual of the cause of action against the wife (*Beck* v. *Pierce*, *ubi supra*).

The 19th section enacts that "no restriction against anticipation contained in any settlement or agreement for a settlement of a woman's own property to be made or entered into by herself shall have any validity against debts contracted by her before marriage." It would seem, therefore, that now a restraint if imposed by a stranger in a marriage settlement or articles is good against all the wife's antenuptial liabilities, and, if imposed by the wife herself, is void as against antenuptial creditors. The obligation of a devisee of land to pay the unpaid debts of the testator is a debt within the meaning of sec. 19 (*In re Hedgely*, 1886, 34 Ch. D. 379). Debts contracted during a previous marriage are "debts contracted by her before marriage" (*Jay* v. *Robinson*, 1890, 25 Q. B. D. 467). The wife is in no way liable for the antenuptial obligations of the husband.

8. Torts committed by a Wife during Coverture.

At common law if a married woman committed a tort an action lay against her and her husband (Com. *Dig.* "Baron and Feme" Y.; *Wilbraham* v. *Snow*, Wms. Saun. 47 *a*.). If the wife were sued alone she could object by plea in abatement and have the husband joined (Bullen and Leake, 3rd ed., p. 399). If she omitted to plead her marriage, or if having pleaded she failed to prove it, judgment went against her personally as a *feme sole*. But if the husband were joined, judgment might be recovered against them both, and both might be taken under a *capias* (*Scott* v. *Morley*, 1887, 20 Q. B. D. 120). The Court might then in its discretion discharge the wife if she had no separate property (*Edwards* v. *Martin*, 1851, 17 Q. B. 693; *Larkin* v. *Marshall*, 1850, 4 Ex. Rep. 804). The duration of the husband's liability varied according as he had or had not authorised the tort committed by the wife. If he had authorised it he was and is still

liable to be sued at any time, but if not he was and is liable to be sued only during the coverture (*Capell* v. *Powell*, 1864, 17 C. B. N. S. 743; *Vaughan* v. *Vandersteyen*, 1854, 2 Drew. 363, 383). But during that he was and perhaps still is liable even though the parties are living apart, unless there were a judicial separation or protection order (20 & 21 Vict. c. 85, s. 26). The husband being liable for torts committed, but not for contracts entered into, by his wife without his authority, questions arise whether a given cause of action lies in tort or on contract (cp. *Wright* v. *Leonard*, 1861, 11 C. B. N. S. 258; *Meux* v. *G. E. Ruy. Co.*, [1895] 2 Q. B. 387). The wife's separate estate was not in equity liable to satisfy her torts (*Wainford* v. *Heyl*, 1875, L. R. 20 Eq. 321), but it could be reached indirectly at law, for if the wife were taken under a *capias* the Court would not discharge her if she had separate property until the damages were satisfied (*Perygusson* v. *Clayworth*, 1844, 6 Q. B. 269). And it was liable in equity to satisfy frauds committed by a married woman in relation to it (*Savage* v. *Foster*, 1723, 9 Mod. 35; *Davies* v. *Hodgson*, 1858, 25 Beav. 177; *Jackson* v. *Hobhouse*, 1817, 2 Mer. 483; 16 R. R. 200; *Barrow* v. *Barrow*, 1858, 4 Kay & J. 409; *Hobday* v. *Peters*, 1860, 28 Beav. 354; *Arnold* v. *Woodhams*, 1873, L. R. 16 Eq. 33; *In re MacIntyre's Estate*, 1887, 21 L. R. Ir. 421). If the husband died before judgment the widow became personally liable as a *feme sole* for torts committed by her during marriage (*Wright* v. *Leonard*, 1861, 11 C. B. N. S. 258).

The Married Women's Property Act, 1882, has greatly altered the law by making the married woman liable to be sued alone. Sec. 1, subs. 2, enacts that "A married woman shall be capable of being sued . . . in tort in all respects as if she were a *feme sole*, and her husband need not be joined with her as defendant, or be made a party to any action or other legal proceeding . . . taken against her; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property and not otherwise." It seems that her liability for torts is not conditional upon her possessing separate estate; on proof of the tort the plaintiff is entitled to judgment, but if the defendant has no separate estate, the judgment cannot be executed. Whether, and to what extent, property subject to a restraint on anticipation may be reached does not seem to have been decided. Before the Act such property was not liable to satisfy torts committed by a married woman; and by sec. 19 of the Act the restraint on anticipation is not affected. Probably such property as is free from anticipation at the date of the judgment, and no more, is liable (see the form of judgment settled in *Scott* v. *Morley*, 1887, 20 Q. B. D. 120). It has been held that the common law liability of a husband to be sued with his wife still exists (*Seroka* v. *Kattenburg*, 1886, 17 Q. B. D. 177) *sed quære*. The liability of a husband for torts committed by his authority no doubt exists.

A breach of trust or *devastavit* committed by a married woman was on a somewhat different footing. The husband continued liable after the wife's death (*Smith* v. *Smith*, 1856, 21 Beav. 385; *In re Smith's Estate*, 1879, 48 L. J. Ch. 205) whether the breach was one of commission or omission (*Bahin* v. *Hughes*, 1886, 31 Ch. D. 390); and so did the wife after the husband's death (*Soady* v. *Turnbull*, 1866, L. R. 1 Ch. 494); for the wife being unable without her husband's assent to accept a trust became upon accepting it his authorised agent, the trust property vesting in him. The 24th section enacts that "The provisions of this Act as to liabilities of married women shall extend to all liabilities by reason of any breach of trust or *devastavit* committed by any married woman being a trustee, executrix, or administratrix either before or after her marriage, and her

husband shall not be subject to such liabilities unless he has acted or intermeddled in the trust or administration."

9. Contracts by Married Women.

(*a*) *As Principals.*—Except in a few exceptional cases, *e.g.* when her husband was convicted of a felony or was civilly dead (*Sparrow* v. *Carruthers*, cited in *Lean* v. *Schutz*, 1778, 2 Black. W. 1197), or when she carried on a trade in the city of London (*Ex parte Carrington*, 1739, 1 Atk. 206), a married woman could not render herself liable on a contract (Com. *Dig.* "Baron and Feme" Q. p. 241). In old days if sued on a contract made by her during marriage she could plead the general issue (*James* v. *Fowkes*, 1697, 12 Mod. 101). By Reg. Gen. 4 Will. IV. coverture was made a special plea in bar. She could, however, contract as agent for another, her husband for instance; but then he was liable on the contract and not she. The Courts of equity allowed her a limited power of contracting in reference to her separate estate, and this innovation was afterwards recognised by the Legislature. A married woman can now therefore contract (1) with reference to her separate estate; (2) as agent for her husband. It is proposed to consider these two cases in order.

The Courts of equity only allowed a married woman the benefit of the separate estate after it had discharged any obligations incurred on the faith of it. But before a contract could be enforced against the separate estate it had to be made, either by express words or by implication of law, with reference to and to bind the separate estate, and it lay on the plaintiff to establish this (*Murray* v. *Barlee*, 1834, 3 Myl. & K. 209). For instance, a married woman might promise to repay out of her separate estate a loan.

Bonds, bills of exchange, promissory notes, contracts to take shares in her own name, in short, any contract or engagement entered into on the credit of the separate estate, was a contract with reference to and to bind the separate estate (*Mrs. Matthewman's* case, 1866, L. R. 3 Eq. 781). The expression "to bind the separate estate" is not an accurate one. The mere contract did not in any way fetter the separate estate or prevent the married woman from parting with it freely (*Johnson* v. *Gallagher*, 1861, 3 De G., F. & J. 494; *Hemingway* v. *Braithwaite*, 1889, 61 L. T. 224). The contract only gave the creditor a right to a judgment declaring that the separate estate which at the date of the contract was, and at the date of the judgment remained, vested in the married woman as her separate estate, excluding any separate property which she was restrained from anticipating, was liable to satisfy the debt or engagement; an inquiry as to what was the separate estate which the married woman had at the time of contracting the debt or engagement, and whether that separate estate or any part of it remained capable of being reached by the judgment and execution of the Court (*Pike* v. *Fitzgibbon*, 1881, 17 Ch. D. 454; *Robinson* v. *Pickering*, 1881, 16 Ch. D. 660); and the appointment of a receiver (*In re Peace and Waller*, 1883, 24 Ch. D. 405). Separate property subject to a restraint on anticipation could not be bound by a contract, and was expressly excepted by the terms of the judgment (*Pike* v. *Fitzgibbon*, *ubi supra*). It could not be reached after the death of the husband to satisfy a contract or engagement made in his lifetime (*Pike* v. *Fitzgibbon*, *ubi supra*). It is clear then that the obligation incurred by a married woman was different from that incurred by a man or by a *feme sole*. It was a proprietary not a personal liability, a liability rather *in rem* than *in personam*; it was her property and not herself that was liable. A debtor's

summons could not issue against her (*Ex parte Jones*, 1879, 12 Ch. D. 484; *Ex parte Holland*, 1874, L. R. 9 Ch. 307); and it was formerly held that the Statute of Limitations had no application to these engagements (*Hodgson* v. *Williamson*, 1880, 15 Ch. D. 87) *sed quære* (*In re Lady Hastings*, 1887, 35 Ch. D. 94).

The Divorce Acts above mentioned conferred upon a married woman who had obtained a decree of judicial separation or a protection order the power of contracting as a *feme sole*. Neither the Married Women's Property Act of 1870 nor that of 1874 directly dealt with the power of contracting. But by sec. 1, subs. (2) of the Act of 1882 it is enacted that "A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued either in contract or in tort, or otherwise, in all respects as if she were a *feme sole*, and her husband need not be joined with her as plaintiff or defendant or be made a party to any action or other legal proceeding brought by or taken against her; and any damages or costs recovered by her in any such action or proceeding shall be her separate property; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise." By the two following subsections, which have been repealed by the Act of 1893, it was enacted (subs. (3)) that "Every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary be shown"; and (subs. (4)) "Every contract entered into by a married woman with respect to and to bind her separate property shall bind not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire."

By sec. 19, "Nothing in this Act contained . . . shall interfere with or render inoperative any restriction against anticipation at present attached or to be hereafter attached to the enjoyment of any property or income by a woman under any settlement, agreement for a settlement, will, or other instrument; but no restriction against anticipation contained in any settlement or agreement for a settlement of a woman's own property to be made or entered into by herself shall have any validity against debts contracted by her before marriage . . ."

On the 1st of January 1883 every married woman became "discovert" within the meaning of sec. 7 of the Statute of Limitations (21 Jac. I. c. 16; *Lowe* v. *Fox*, 1885, 15 Q. B. D. 667); and now the Court will act on the analogy of that statute, and hold that a married woman's debt is barred in six years (*In re Lady Hastings*, 1887, 35 Ch. D. 94). The form of the judgment which the Married Women's Property Act, 1882, enables a plaintiff to recover against a married woman was settled by the Court of Appeal in *Scott* v. *Morley*, 1887, 20 Q. B. D. 120, and is as follows: "It is adjudged that the plaintiff do recover £ and costs, to be taxed against the defendant (the married woman), such sum and costs to be payable out of her separate property, as hereinafter mentioned, and not otherwise. And it is ordered that execution hereon be limited to the separate property of the defendant (the married woman), not subject to any restriction against anticipation, unless, by reason of sec. 19 of the Married Women's Property Act, 1882, the property shall be liable notwithstanding such restriction."

It was decided in the same case (*Scott* v. *Morley*, *ubi supra*) that this statute had not altered the nature of a married woman's liability, which remains to this day a proprietary and not a personal liability, upon which

a bankruptcy notice cannot issue (*In re Lynes*, [1893] 2 Q. B. 113; *In re Gardiner*, 1887, 20 Q. B. D. 249), even if the husband dies after the judgment and before the notice served (*In re Hewett*, [1895] 1 Q. B. 328); and to enforce which proceedings under the Debtors Act, 1869, cannot (*Scott* v. *Morley*, 1887, 20 Q. B. D. 120), though garnishee proceedings may, be taken against her (*Holtby* v. *Hodgson*, 1889, 24 Q. B. D. 103).

Now when it was once decided that the liability was still a proprietary liability, it followed that the plaintiff had to prove the possession of separate property at the time of making the contract (*In re Shakespear*, 1885, 30 Ch. D. 169; *Palliser* v. *Gurney*, 1887, 19 Q. B. D. 519; *Stogdon* v. *Lee*, [1891] 1 Q. B. 661), such that the married woman could reasonably be expected to contract with reference to it (*Harrison* v. *Harrison*, 1888, 13 P. D. 180; *Beckett* v. *Tasker*, 1887, 19 Q. B. D. 7; *Leake* v. *Driffield*, 1889, 24 Q. B. D. 98; *Braunstein* v. *Lewis*, 1891, 65 L. T. 449).

Again, sec. 1, subs. (3) of the Act of 1882, in enacting that every contract entered into by a married woman should be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary were shown, apparently ignored that great majority of cases in which the wife was contracting as agent for her husband. Moreover, under sec. 1, subs. (4) of the Act of 1882 it was decided that property which a married woman acquired after the death of her husband could not be reached by a creditor who had recovered a judgment on a contract made by her during the coverture (*Beckett* v. *Tasker*, 1887, 19 Q. B. D. 7; *Pelton* v. *Harrison*, [1891] 2 Q. B. 422). To remedy these several defects the Married Women's Property Act of 1893 (56 & 57 Vict. c. 63) was passed, which enacted (s. 1) that "Every contract hereafter entered into by a married woman otherwise than as agent (*a*) shall be deemed to be a contract entered into by her with respect to and to bind her separate property whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such contract; (*b*) shall bind all separate property which she may at that time or thereafter be possessed of or entitled to: and (*c*) shall also be enforceable by process of law against all property which she may thereafter while discovert be possessed of or entitled to." These words but for the proviso which follows would be wide enough to include property, which, though subject to a restraint on anticipation at the date of the contract, became free on the death of the husband, and which could not have been reached under the Act of 1882 (*Beckett* v. *Tasker*, 1887, 19 Q. B. D. 7; *Pelton* v. *Harrison*, [1891] 2 Q. B. 422). It was, however, further enacted by a proviso to sec. 1, that "Nothing in this section contained shall render available to satisfy any liability or obligation arising out of such contract any separate property which at that time (*i.e.* at the date of the contract) or thereafter she is restrained from anticipating." That a creditor of a married woman whose separate property is subject to a restraint on anticipation can reach under a judgment income which falls into possession after the debt and before the judgment was decided in *Hood Barrs* v. *Cathcart*, [1894] 2 Q. B. 559, and assumed in *Hood Barrs* v. *Heriot*, [1896] App. Cas. 174. *Sed quære*, at any rate since the Act of 1893, s. 1. It is clear that income coming to hand after the judgment cannot be reached to satisfy the judgment (*Whiteley* v. *Edwards*, [1896] 2 Q. B. 48). Similar questions arise with regard to orders to pay costs. Before the Act of 1882 only such income as was paid or payable at the date of the Act upon which the order was founded could be made to satisfy costs (*In re Glanvil*, 1886, 31 Ch. D. 532). After the Act of 1882 all income in possession at the date of the order for costs was

held liable to satisfy the order (*Cox* v. *Bennett*, [1891] 1 Ch. 617), but income paid or payable after the order could not be reached (*Hood Barrs* v. *Cathcart*, [1894] 2 Q. B. 559). The injustice thus caused when a married woman restrained from anticipation instituted unsuccessful proceedings led to the passing of sec. 2 of the Married Women's Property Act, 1893, by which "in any action or proceeding now or hereafter instituted by a woman or by a next friend on her behalf, the Court before which such action or proceeding is pending shall have jurisdiction by judgment or order from time to time to order payment of the costs of the opposite party out of property which is subject to a restraint on anticipation, and may enforce such payment by the appointment of a receiver, and the sale of the property, or otherwise as may be just." A counterclaim is a "proceeding instituted" by a woman within the meaning of this section (*Hood Barrs* v. *Cathcart*, [1895] 1 Q. B. 873); but an appeal is not (*Hood Barrs* v. *Heriot*, [1897] App. Cas. 177); nor is a petition in an action in which she is defendant (*Hollington* v. *Dear*, 1895, W. N. 35); nor an action brought in consequence of a caveat entered by her (*Moran* v. *Place*, [1896] Prob. 214).

(*b*) *Agency Contracts.*—Next with regard to contracts made by married women as agents for and so as to bind their husbands. Since at common law a married woman could not enter into a personal contract, the only question in an action against her husband on a contract made by her was whether she had authority to bind him and had bound him by the contract. She was treated as an agent who stipulated for no personal liability (*Smout* v. *Ilbery*, 1842, 10 Mee. & W. 1), so that she could not be sued, either on an implied warranty of authority, or on the contract, when her husband was in fact dead at the time when the goods were supplied (*ibid.*). The law is now altered, and there can be little doubt that she could be made liable for breach of warranty of authority or otherwise in any case where an ordinary agent would be so liable. So far, however, as the husband's liability is concerned, the law is generally in the same condition as it was before the recent legislation. Any changes effected thereby will be considered in dealing with the various branches of the subject.

The authority of a wife to bind her husband by her contracts is simply a branch of the law of principal and agent. "A man shall be charged in debt for the contract of his bailiff or servant, where he giveth authority to his bailiff or servant to buy and sell for him; and so for the contract of his wife, if he giveth authority to his wife, otherwise not" (Fitz. *Nat. Brev.* 120 G.). The mere fact of marriage implies no such authority (*Debenham* v. *Mellon*, 1880, 6 App. Cas. 24). This authority may be either (1) *express*, (2) *implied*, or (3) *ostensible*, *i.e.* the husband may have so conducted himself as to preclude himself from denying the authority.

(1) Where an *express* authority is relied on, the only difficulty is in proving it. If a husband gives his wife a mandate or permission to purchase goods, he is, of course, liable to pay the price of them. And the authority may be inferred from his conduct, though no actual mandate can be proved (*Lord* v. *Hale*, 1849, 8 C. B. 627).

(2) But where no express authority is given, differences of fact and variations in the law make the subject somewhat difficult. Different considerations apply according as husband and wife are living (i.) together, or (ii.) apart.

(i.) While they cohabit, the husband's assent shall be presumed to all necessary contracts, unless the contrary appear (per Holt, C.J., *Etherington* v. *Parrot*, 1704, 1 Salk. 118; *Jolly* v. *Rees*, 1864, 15 C. B. N. S. 628; *Debenham* v. *Mellon*, 1880, 6 App. Cas. 24). But the contrary may appear in

many ways; as if the husband warn the plaintiff not to give credit (*Etherington* v. *Parrot*, *ubi supra*), or if he makes the wife an allowance for necessaries and forbids her to pledge his credit (*Jolly* v. *Rees*, 1864, 15 C. B. N. S. 628; *Debenham* v. *Mellon*, 1880, 5 Q. B. D. 394; 6 App. Cas. 24), in which case notice to the tradesman of the allowance or prohibition is immaterial (*Jolly* v. *Rees*, *ubi supra*).

The term "necessary contracts" appears to mean contracts for goods suitable to the husband's estate and degree, or to the station which he permits his wife to assume (*Jolly* v. *Rees*, *ubi supra*; see also *Hunt* v. *De Blaquiere*, 1829, 5 Bing. 550; 30 R. R. 737; *Emmett* v. *Norton*, 1838, 8 Car. & P. 506). It may be that in this definition there is a slight confusion of thought, the station which the husband permits the wife to assume suggesting an authority which his conduct precludes him from denying rather than an authority which cohabitation confers. It is to be remembered that the case of a wife, in principle at all events, is not different from that of anybody else at the head of an establishment. If there is an establishment of which there is a domestic manager, although the wife may be the most natural domestic manager, and though the presumption may be strongest when she is so, yet the same presumption may, and often does, arise from similar facts, when the actual manager is not a wife but a sister, for example, or merely a woman living with a man, and passing as his companion with or without the assumption of the name of wife (*Watson* v. *Threlkeld*, 1794, 2 Esp. 637). It is also the same when the person to whom the domestic management is delegated is a housekeeper or a steward, or any other kind of superior servant. In all these cases the question of the authority is really a question of fact (*Debenham* v. *Mellon*, 1880, 6 App. Cas. at p. 33).

The question for the jury in cases which fall under this branch of the subject is not whether the goods supplied were necessaries suitable to the wife's station, but whether under the circumstances she had any authority express or implied to pledge her husband's credit (*Reid* v. *Teakle*, 1853, 13 C. B. 627). Evidence that the wife is already supplied, by purchases from other tradesmen, with articles similar to those alleged to be necessaries, is admissible to prove that she had no authority to purchase them on her husband's account (*Reneaux* v. *Teakle*, 1853, 8 Ex. 680), and this though the true facts were unknown to the plaintiff (see also *Barnes* v. *Toye*, 1884, 13 Q. B. D. 410; *Johnstone* v. *Marks*, 1887, 19 Q. B. D. 509).

It may be added that a wife has no implied authority during cohabitation to borrow money even for the purchase of necessaries (*Knox* v. *Bushell*, 1857, 3 C. B. N. S. 334; *In re Cooke*, 1892, 10 Mor. Bky. 8).

(ii.) When the parties are living apart, however, the presumption is the other way. Then the presumption, until the contrary is shown, is that the wife has no authority to pledge her husband's credit. Where the plaintiff only proves that he has supplied goods to the defendant's wife, who is living apart from him, he must be nonsuited. In order to recover he must go further, and show that under the circumstances of the separation, or conduct of the husband (see below, *Ostensible Agency*), she had such authority (*Mainwaring* v. *Leslie*, 1826, M. & M. 18; 31 R. R. 691). It matters not that the tradesman had no notice of the separation or consequent revocation of authority, unless he has been previously dealing with the wife on credit by the husband's permission; for separation is not like a dissolution of partnership that a man must advertise the fact to the whole world (*Wallis* v. *Biddick*, 1873, 22 W. R. 76), and a tradesman who deals with a married woman does so, as regards his remedy against the husband, at his own

risk (*Clifford* v. *Laton*, 1827, 3 Car. & P. 15). Separation revokes the wife's agency, and the state of the plaintiff's information tends in no way to restore it. This seems hard on the plaintiff, but it would be much harder on the husband were it otherwise.

But the plaintiff may prove facts which, notwithstanding the separation, will clothe the wife with authority to bind her husband. One of the duties of a husband is to maintain his wife during the marriage, and so long as the wife remains faithful to him (*Read* v. *Legard*, 1851, 6 Ex. Rep. 642), at least so far as any separate property she may have is insufficient for that purpose; and he may by law be compelled to find her necessaries, such as meat, drink, clothes, physic, etc. If he fails in this duty the law will supply his assent to her acts in supplying herself. If, therefore, a creditor, who has supplied goods fairly to be termed necessaries, proves such a failure of duty on the part of the husband, he thereby proves an authority in the wife by law to pledge her husband's credit for such necessaries (*Read* v. *Legard*, 6 Ex. Rep. 642; *Seaton* v. *Benedict*, 1828, 5 Bing. 28; *Montague* v. *Benedict*, 1825, 3 Barn. & Cress. 631; 27 R. R. 444). Such a failure of duty would be established by evidence that the parties are living apart (i.) on account of the husband's misconduct, the wife being left without adequate means; or (ii.) by mutual consent, the husband failing to pay her a reasonable, or agreed, allowance. The wife in those cases is entitled in law to pledge his credit for suitable necessaries.

(i.) If the husband turns his wife out of doors, or forces her to leave him through gross misconduct (*Aldis* v. *Chapman*, Selw. N. P. 232) or cruelty (*Hodges* v. *Hodges*, 1796, 1 Esp. 441; 4 R. R. 889), which amounts to the same thing (*Houliston* v. *Smyth*, 1825, 3 Bing. 127); or if he deserts her (*Bolton* v. *Prentice*, 1745, 2 Stra. 1214), he thereby makes her an agent of necessity to pledge his credit for necessaries. But a *bonâ fide* request to her to return, or offer to receive her back, would apparently revoke this agency; for after that offer she would be living apart from him without his consent. Moreover, as his duty to maintain her only continues while she continues faithful to him, unchastity in the wife, unless connived at or forgiven, would also terminate her agency (*Harris* v. *Morris*, 1801, 4 Esp. 41; *Govier* v. *Hancock*, 1796, 6 T. R. 603; 3 R. R 271; *Woodward* v. *Dowse*, 1861, 10 C. B. N. S. 722; *Wilson* v. *Glossop*, 1888, 20 Q. B. D. 354). Moreover, this agency only lasts while the wife is left without adequate provision. While the husband provides for her wants, or if she has means of her own (*Eastland* v. *Burchell*, 1878, 3 Q. B. D. 432), the agency does not exist. Therefore while a husband pays alimony he is not liable for her contracts, but *secus* where he fails to pay it (*Hunt* v. *De Blaquiere*, 1829, 5 Bing. 550; 30 R. R. 737).

Now though the principle above stated would only warrant the wife in pledging her husband's credit for articles reasonably necessary for her subsistence (*Emmett* v. *Norton*, 1838, 8 Car. & P. 506), yet the law has gone beyond the principle and authorises the wife to pledge his credit for reasonable expenses according to the husband's degree (*Bazeley* v. *Forder*, 1868, L. R. 3 Q. B. 559), which may include liveried servants; or residence at a watering place for the sake of her health (*Thompson* v. *Hervey*, 1768, 4 Burr. 2177); or legal expenses (*Wilson* v. *Ford*, 1868, L. R. 3 Ex. 63).

(ii.) Where the parties are living apart by mutual consent and the husband fails to pay the wife an agreed, or if there be no agreement in this behalf, a reasonable, allowance, the wife, if she has not sufficient means of her own, may pledge his credit for suitable necessaries (*Ozard* v. *Darnford*, Selw. N. P., 13th ed., p. 229; *Eastland* v. *Burchell*, 1878, 3 Q. B. D. 432).

If the husband pays an agreed allowance, even though it be insufficient, the wife has no authority to pledge his credit (*Eastland* v. *Burchell*, *ubi supra*; *Negus* v. *Forster*, 1882, 46 L. T. 675, where the agreed amount was less than a sum which had been decreed as alimony). If there be no agreement as to allowance, the adequacy thereof is a question for the jury (*Hodgkinson* v. *Fletcher*, 1814, 4 Camp. 70; 15 R. R. 725; *Liddlow* v. *Wilmot*, 1817, 2 Stark. N. P. 86; 19 R. R. 684; *Emmett* v. *Norton*, 1838, 8 Car. & P. 506); and the wife could, in so far as it is inadequate, pledge her husband's credit for suitable necessaries, unless she is possessed of means to supply them. It would seem that she might borrow money to supply herself, if that were necessary (*In re Cooke*, 1892, 10 Mor. Bky. 8).

The husband used to be liable, whether he made his wife an allowance or not, for the cost of legal proceedings rendered necessary through his misconduct; and her solicitor could recover from him, whatever the event of the proceedings might be, provided he conducted the litigation properly, and fairly investigated the charges brought, and saw a reasonable prospect of success (*Robertson* v. *Robertson*, 1881, 6 P. D. 119). The effect of the Married Women's Property Acts on this liability is not at all clear. Probably it still exists (*Harrison* v. *Harrison*, 1888, 13 P. D. 180), provided the proceedings are fairly to be called necessary (see also *Earnshaw* v. *Earnshaw*, [1896] Prob. 160).

A husband is also liable to pay the expenses of his wife's funeral, whatever the wife's means may be, and whether the parties are living together or apart (*Jenkins* v. *Tucker*, 1788, 1 Black. H. 90; *Ambrose* v. *Kerrison*, 1851, 10 C. B. 776); unless, perhaps, the wife is living apart from him by her own default. A person who voluntarily incurs these expenses in good faith can recover them from the husband (*Bradshaw* v. *Beard*, 1862, 12 C. B. N. S. 344). Formerly the husband could not reimburse himself out of the wife's separate estate unless she had charged it with these expenses (*Willeter* v. *Dobie*, 1856, 2 Kay & J. 647). But since the Married Women's Property Act, 1882, he probably can (*In re M'Myn*, 1886, 33 Ch. D. 575).

It may be added that if the parties are living apart through the wife's default, and without the husband's consent, she has no authority to pledge his credit at all, even for necessaries (*Etherington* v. *Parrot*, 1704, Raym. (Ld.) 1006; *Hindley* v. *Westmeath*, 1827, 6 Barn. & Cress. 200; 30 R. R. 290).

(3) *Ostensible Agency.*—But even though the circumstances be such that the wife has neither in fact nor in law authority to pledge her husband's credit, yet if he so acts as to lead others to the reasonable belief that she has such authority, if he holds her out as having authority to bind him, and they, acting on the belief that she has such authority, give credit accordingly, he is precluded from denying her authority, and is liable on the contracts. Whether the husband has so acted is a question of fact in each case. If he were to stand by while his wife were ordering goods, for example, such conduct would entitle the tradesman to assume that she had his authority to order them (*Jetley* v. *Hill*, 1884, 1 C. & E. 239). So if the wife has ordered similar goods on former occasions, and the husband has paid for them (*Debenham* v. *Mellon*, 1880, 5 Q. B. D. 394, per Thesiger, L.J., 6 App. Cas. 24, per Lord Blackburn). If the husband, having so dealt, afterwards revokes the wife's agency, whether expressly or by separating from her, which is a revocation in law, he must give notice to the tradesman (*Wallis* v. *Biddick*, 1873, 22 W. R. 76; *Ryan* v. *Sams*, 1848, 12 Q. B. 460), otherwise her ostensible agency will continue, even where the husband becomes insane and cannot give notice of the revocation (*Drew* v. *Nunn*, 1879, 4

Q. B. D. 661). Of course in all these cases the contracts made by the wife must fall within the scope of the authority which the husband is precluded from denying.

(*c*) *Contracts between Husband and Wife.*—At common law husband and wife could not contract together. In the eye of the law they were one person (Com. *Dig.* "Baron and Feme" D. 1, p. 220; *Phillips* v. *Barnet*, 1876, 1 Q. B. D. 436). If two contracting parties intermarried, the contract was suspended during the marriage (*Fitzgerald* v. *Fitzgerald*, 1868, L. R. 2 P. C. 83). In equity a wife might sue her husband to recover a loan out of her separate estate (*Woodward* v. *Woodward*, 1850, 3 De G. & Sm. 672). The Married Women's Property Act, 1882, severed the unity of person in this respect, and there seems to be no doubt that since that Act either can sue the other on a contract (*Butler* v. *Butler*, 1885, 14 Q. B. D. 831; 16 Q. B. D. 374; *M'Gregor* v. *M'Gregor*, 1888, 21 Q. B. D. 424). The right of a wife to claim in her husband's bankruptcy for a loan made by her to him is provided for by sec. 3 of the Act of 1882 as follows: "Any money or other estate of the wife lent or intrusted by her to her husband for the purpose of any trade or business carried on by him, or otherwise, shall be treated as assets of her husband's estate in case of his bankruptcy, under reservation of the wife's claim to a dividend as a creditor for the amount or value of such money or estate after, but not before, all claims of the other creditors of the husband for valuable consideration, in money or money's worth, have been satisfied."

This section only applies where the husband is a sole trader (*In re Taff*, 1887, 19 Q. B. D. 88). It has no application to a loan by a wife for purposes other than her husband's trade or business (*Ex parte Tidswell*, 1887, 56 L. J. Q. B. 548; *Mackintosh* v. *Pogose*, [1895] 1 Ch. 505). The burden of proving that the loan was not for the purposes of trade is on the wife if the husband is a trader (*Ex parte District Bank*, 1886, 16 Q. B. D. 700). But if she discharges this burden, she may prove in his bankruptcy in competition with other creditors. Before the Act, a wife who had lent money to her husband could claim in the administration of her husband's estate after his death if there were no other creditors to contend with (*Slanning* v. *Style*, 1734, 3 P. Wms. 337), but apparently not otherwise. If, however, she were administratrix of the husband's estate, she might retain out of his estate, though insolvent, the amount of a loan which she had made for the purposes of his business, and this right she still has (*In re May*, 1890, 45 Ch. D. 490). But, apart from this right of retainer, the combined effect of sec. 3 of the Act of 1882 and sec. 10 of the Judicature Act, 1875, is that in the administration of an insolvent estate by the Court the claim of the widow for money lent for the purposes of the deceased's trade is postponed to the claims of his other creditors (*In re Long*, [1895] 1 Ch. 652). The section extends to the case of a wife the principle of sec. 3 of the Partnership Act, 1890 (*Ex parte District Bank*, 1885, 16 Q. B. D. 700). A husband who makes a loan to his wife for the purposes of her separate trade will, it is thought, be postponed to her trade creditors by the operation of the Partnership Act, 1890. There is no provision applicable to such a case in the Married Women's Property Act, 1882.

10. Bankruptcy of Married Women.

Before the Married Women's Property Act, 1882, a married woman was not liable to the bankruptcy laws, unless when trading separately under the custom of the City of London, or when her husband was civilly dead (*Ex parte Jones*, 1879, 12 Ch. D. 484), or *semble* if she were trading while a

protection order or decree of judicial separation was in force (20 & 21 Vict. c. 85, ss. 21, 26). But now, by sec. 1, subs. (5) of the Act of 1882, "Every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a *feme sole*." As long as the trade debts remain unpaid, the married woman is carrying on the trade (*In re Dagnall*, [1896] 2 Q. B. 407). The trade is not her separate trade if carried on in partnership with her husband (*In re Helsby*, [1893] 63 L. J. Q. B. 261).

If a married woman is to be made bankrupt, it must be by other means than a bankruptcy notice, for that can only be in one form, viz. that provided by Form 6 in the Appendix to the Bankruptcy Rules, 1886, and as it presupposes a personal liability to pay the judgment debt, it is not applicable when the judgment debtor is a married woman (*In re Lynes*, [1893] 2 Q. B. 113; *In re Gardiner*, 1888, 20 Q. B. D. 249; *In re Hewett*, [1895] 1 Q. B. 328), unless she fails to prove the marriage (*Dillon* v. *Cunningham*, 1872, L. R. 8 Exch. 23; *Poole* v. *Canning*, 1867, L. R. 2 C. P. 241; *Day* v. *Freund*, 1876, 35 L. T. 551).

11. Married Women as Trustees.

Before the Act of 1882, a married woman could not accept the office of trustee or executor without her husband's assent. If he assented to her acceptance of the trust, he was liable for the breaches of trust (*Bahin* v. *Hughes*, 1886, 31 Ch. D. 390), and was entitled to exercise control over, and his concurrence was necessary to, the execution of the trust (Williams on *Executors*, 8th ed., pp. 967, 968). The husband was the owner of the trust estate almost as completely as if the wife were entitled to it beneficially. The wife could not dispose of it without his concurrence (Williams on *Executors*, 8th ed., *ubi supra*). The estate, however, was not liable to satisfy the husband's debts (*Farr* v. *Newman*, 1792, 4 T. R. 621; 2 R. R. 479). The wife could continue the representation of a testator's estate by will without her husband's concurrence (*Hodsden* v. *Lloyd*, 1789, 2 Bro. C. C. 534; *Scammell* v. *Wilkinson*, 1802, 2 East, 552; *Willock* v. *Noble*, 1875, L. R. 7 H. L. 580). The husband, on the other hand, could dispose of the testator's estate without the wife's concurrence (*In re Wood*, 1861, 3 De G., F. & J. 126; *Soady* v. *Turnbull*, 1866, L. R. 1 Ch. 494). He could release debts owing to the estate (Williams, *Executors*, 8th ed., 970), but could not sue without joining his wife (*ibid.* p. 970, 971). A married woman is by secs. 7 and 8 of the Divorce Act, 1858, enabled to act in a trust as a *feme sole* while a judicial separation or protection order is in force, and can transfer stock, for example, standing in a testator's name, without her husband's concurrence (*Bathe* v. *Bank of England*, 1858, 4 Kay & J. 564). By sec. 6 of the Vendor and Purchaser Act, 1874, a married woman who is a bare trustee may convey or surrender freehold or copyhold estate as a *feme sole* (*In re Docwra*, 1885, 29 Ch. D. 693).

By sec. 24 of the Act of 1882, "the word 'contract' in this Act shall include the acceptance of any trust, or the office of executrix or administratrix, and the provisions of this Act as to liabilities of married women shall extend to all liabilities by reason of any breach of trust or devastavit committed by any married woman being a trustee, or executrix, or administratrix either before or after her marriage, and her husband shall not be subject to such liabilities unless he has acted or intermeddled in the trust or administration." A married woman may now therefore accept a trust, or the office of executrix or administratrix, by virtue of her power to contract as a *feme sole*, and her husband need not join in the administration

bond (*In the Goods of Harriet Ayres*, 1883, 8 P. D. 168). There is, however, no section in the Act vesting the trust property in her solely, and it has been held that if real estate of which she is seised as trustee is to be conveyed, the formalities of the Fines and Recoveries Act must be complied with (*In re Harkness and Allsopp*, [1896] 2 Ch. 358). Sec. 18, which enables a married woman to deal with the trust property, makes no mention of real estate. The section is as follows: "A married woman who is an executrix or administratrix alone or jointly with any other person or persons of the estate of any deceased person, or a trustee alone or jointly as aforesaid of property subject to any trust, may sue or be sued, and may transfer or join in transferring any such annuity or deposit as aforesaid (*i.e.* as mentioned in sec. 6), or any sum forming part of the public stocks or funds, or of any other stocks or funds transferable as aforesaid, or any share, stock, debenture, debenture stock, or other benefit, right, claim, or other interest of or in any such corporation, company, public body, or society in that character, without her husband, as if she were a *feme sole*."

It may be added that, notwithstanding the Act of 1882, a married woman is still incapable of acting as a next friend or guardian *ad litem* (*In re Duke of Somerset*, 1887, 34 Ch. D. 465).

12. Proceedings by and against Married Women.

At common law a married woman could not sue as a *feme sole* unless she carried on a trade within the custom of the City of London, or her husband were civilly dead. She could only sue as co-plaintiff with her husband. In Chancery she could not sue either by herself or her next friend without her husband, except by leave of the Court on giving such security for costs as the Court might require (Daniell, *Ch. Pr.*, 6th ed., p. 119). If sued at common law she could by pleading in abatement insist on her husband being joined as a defendant. In Chancery, also he was regularly made a defendant, unless by leave of the Court (Daniell, *Ch. Pr.*, 6th ed., p. 185).

The Divorce Act, 1858, placed a married woman during a judicial separation or protection order in the position of a *feme sole* for the purpose of suing and being sued. The M. W. P. Act, 1870, provided (by s. 11) that a married woman might maintain an action in her own name for the recovery of any wages, earnings, money, and property by that Act declared to be her separate property, or of any property belonging to her before marriage which her husband should, by writing under his hand, have agreed with her should belong to her after marriage as her separate property; and that she should have in her own name the same remedies, both civil and criminal, against all persons whomsoever for the protection and security of such wages, etc., and of any chattels or other property purchased or obtained by means thereof for her own use, as if such wages, etc., belonged to her as an unmarried woman. But under this Act she could only be sued alone for an antenuptial debt. In other actions the husband had to be joined (*Hancocks* v. *Lablache*, 1878, 3 C. P. D. 197). But now by the M. W. P. Act, 1882, s. 1, subs. (2), "A married woman shall be capable . . . of suing and being sued either in contract or in tort, or otherwise, in all respects as if she were a *feme sole*, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her . . ." A married woman may now sue alone without giving security for costs, even though she has no separate property available for costs (*In re Isaac*, 1885, 30 Ch. D. 418). But she may be ordered to secure the costs of an appeal (*Whittaker* v. *Kershaw*, 1890, 44 Ch. 296). Suing for an injunction, she must give the ordinary undertaking in damages; and her

undertaking is sufficient even though she does not possess separate property free from restraint on anticipation (*In re Prynne*, 1885, 53 L. T. 465; *Pike* v. *Cave*, 1893, 62 L. J. Ch. 937). Where a married woman pays a sum into Court as a condition of having leave to defend under Order 14, a successful plaintiff is entitled to have the sum paid out and need not await an inquiry whether the married woman has separate estate liable to execution (*Bird* v. *Barstow*, [1892] 1 Q. B. 94). A judgment against a married woman, the form of which was settled in *Scott* v. *Morley*, 1887, 20 Q. B. D. 120 (see above), imposes a liability on her property only, and not on her person. Hence she cannot be imprisoned on a debtor's summons (*Draycott* v. *Harrison*, 1886, 17 Q. B. D. 304), nor can a bankruptcy notice issue against her (*In re Lynes*, [1893] 2 Q. B. 113). But garnishee proceedings may be taken on the judgment (*Holtby* v. *Hodgson*, 1889, 24 Q. B. D. 103).

By R. S. C., Order 9, r. 3, a husband and wife, if sued together, must both be served with the writ; when suing together they must make discovery by separate affidavits (*Fendall* v. *O'Connell*, 1885, 29 Ch. D. 899). The trustees need not be made parties to an action in which it is sought to reach separate property in their hands. Sec. 1, subs. (2) continues: "and any damages or costs recovered by her in any such action or proceeding shall be her separate property; and any damages or costs recovered against her shall be payable out of her separate property, and not otherwise."

By sec. 12 of the Act of 1882 it is enacted that: "Every woman, whether married before or after this Act, shall have in her own name, against all persons whomsoever, including her husband, the same civil remedies, and also (subject, as regards her husband, to the proviso hereinafter contained) the same remedies and redress by way of criminal proceedings, for the protection and security of her own separate property, as if such property belonged to her as a *feme sole*, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort. In any indictment or other proceeding under this section it shall be sufficient to allege such property to be her property; and in any proceeding under this section a husband or wife shall be competent to give evidence against each other, any statute or rule of law to the contrary notwithstanding: Provided always that no criminal proceeding shall be taken by any wife against her husband by virtue of this Act while they are living together, as to or concerning any property claimed by her, nor while they are living apart, as to or concerning any act done by the husband while they were living together, concerning property claimed by the wife, unless such property shall have been wrongfully taken by the husband when leaving or deserting, or about to leave or desert, his wife."

A husband and wife can now therefore take civil proceedings against each other, with this qualification, viz. they cannot sue each other in tort unless the action be brought by the wife for the protection and security of her separate property. The following proceedings have been held to be for the protection and security of the separate property: An injunction to restrain the husband from entering his wife's house (*Wood* v. *Wood*, 1871, 19 W. R. 1049; *Symonds* v. *Hallett*, 1883, 24 Ch. D. 346), otherwise than for the purpose of exercising marital rights (*Weldon* v. *De Bathe*, 1884, 14 Q. B. D. 339); an action for wrongfully expelling his wife from her house, or for trespass on her separate property (*Moore* v. *Robinson*, 1878, 48 L. J. Q. B. 156; *Allen* v. *Walker*, 1870, L. R. 5 Ex. 187); an action for wrongfully interfering with her business (*Wood* v. *Wood*, 1871, 19 W. R. 1049), or for libelling her in respect of it (*Summers* v. *City Bank*, 1874, L. R. 9 C. P. 580), or for dishonouring her cheque (*ibid.*). But criminal proceedings for

libel are not within the section (*R.* v. *Mayor of London*, 1886, 16 Q. B. D. 772). A husband, on the other hand, cannot sue his wife for trespass on his property, or indeed for any other tort, though she may be indicted for a forcible entry (*R.* v. *Smyth*, 1832, 1 Moo. & R. 155).

Sec. 17 deals with the determination of questions between husband and wife in these words: "In any question between husband and wife as to the title to or possession of property, either party, or any such bank, corporation, company, public body, or society as aforesaid in whose books any stocks, funds, or shares of either party are standing, may apply by summons or otherwise in a summary way to any judge of the High Court of Justice in England or in Ireland, according as such property is in England or in Ireland, or (at the option of the applicant irrespectively of the value of the property in dispute) in England to the judge of the County Court of the district, or in Ireland to the chairman of the Civil Bill Court of the division in which either party resides, and the judge of the High Court of Justice or of the County Court, or the chairman of the Civil Bill Court (as the case may be), may make such order with respect to the property in dispute, and as to the costs of and consequent on the application, as he thinks fit, or may direct such application to stand over from time to time, and any inquiry touching the matters in question to be made in such manner as he shall think fit: Provided always that any order of a judge of the High Court of Justice to be made under the provisions of this section shall be subject to appeal in the same way as an order made by the same judge in a suit pending or on an equitable plaint in the said Court would be; and any order of a County or Civil Bill Court under the provisions of this section shall be subject to appeal in the same way as any other order made by the same Court would be, and all proceedings in a County Court or Civil Bill Court under this section, in which, by reason of the value of the property in dispute, such Court would not have had jurisdiction if this Act or the Married Women's Property Act, 1870, had not passed, may, at the option of the defendant or respondent to such proceedings, be removed as of right into the High Court of Justice in England or Ireland (as the case may be), by writ of *certiorari* or otherwise as may be prescribed by any rule of such High Court; but any order made or act done in the course of such proceedings prior to such removal shall be valid, unless order shall be made to the contrary by such High Court: Provided also, that the judge of the High Court of Justice or of the County Court, or the chairman of the Civil Bill Court, if either party so require, may hear any such application in his private room: Provided also that any such bank, corporation, company, public body, or society, as aforesaid shall, in the matter of any such application for the purposes of costs or otherwise, be treated as a stakeholder only."

The 10th section provides for the case where one party has improperly invested the moneys of the other in his or her own name, and enacts that if a wife improperly invests her husband's money the Court may, in an application under sec. 17, order the dividends, etc., to be transferred to the husband. Probably sec. 17 would of its own force apply to the case of a husband improperly investing his wife's money. Sec. 10 makes no provision for such a case.

By sec. 23 the legal personal representative of any married woman shall, in respect of her separate estate, have the same rights and liabilities and be subject to the same jurisdiction as she would if she were living.

[*Authorities.*—Lush on *Husband and Wife*, 2nd ed.; Macqueen on *Husband and Wife*; Eversley, *Domestic Relations*, 1896: Edwards and Hamilton, *Law of Husband and Wife*, 1883; Crawley, *Husband and Wife*,

1892; and among older treatises, Clancy, *Husband and Wife*, 3rd ed., 1827; Roper, *Husband and Wife*, 1849; and see also lists of authorities appended to articles DIVORCE; DESERTION OF WIFE AND CHILDREN; MARRIAGE; and these articles and the article ALIMONY.]

Hush Money.—1. Any arrangement by a private person not to prosecute, or to desist from, stifle or stay, a prosecution for any offence involving a public injury, is void as being against the public interest in the administration of justice; nor will sanction by the judge improve the legal value of such a contract (*Jones* v. *Merionethshire P. B. Building Society*, [1892] 1 Ch. 173; *Vint* v. *Windhill Local Board*, 1890, 45 Ch. D. 351; *Rawlings* v. *Coal Consumers Association*, 1884, 43 L. J. M. C. 111; *Keir* v. *Leeman*, 1846, 9 Q. B. 371). There are some authorities in favour of the legality of agreeing to desist from a prosecution for common assault or libel or trade mark offences (*Keir* v. *Leeman*, 1846, 9 Q. B. 371; *Fisher* v. *Apollinaris Co.*, 1875, L. R. 10 Ch. 297).

2. Where the offence is felony, persons who agree for valuable consideration not to prosecute, or to show favour on the prosecution, are guilty of the common law misdemeanour of compounding a felony, whether the agreement is or is not carried out (*R.* v. *Burgess*, 1885, 16 Q. B. D. 141; Steph. *Dig. Crim. Law*, 5th ed., art. 177; Mayne, *Ind. Crim. Law*, 1896, 451, 452).

3. It is a felony by statute to take any reward for the recovery of property acquired by any felony or misdemeanour, without using due diligence to bring the offender to trial. Punishment, penal servitude from three to seven years, or imprisonment with or without hard labour for not over two years (24 & 25 Vict. c. 96, s. 101; see also ADVERTISING FOR STOLEN PROPERTY).

4. It is a statutory misdemeanour to compound a penal action without order or consent of the Court in which the action is brought (18 Eliz. c. 5, ss. 4, 5; Rules of Supreme Court, 1883, Order 50, r. 13). It is not necessary to prove that any penalty had, in fact, been incurred (*R.* v. *Best*, 2 Moo. C. C. 125).

5. It appears not to be a misdemeanour to compound or stifle a prosecution for misdemeanour (1 Steph. *Hist. Crim. Law*, 502), and there has been a practice to withdraw from a prosecution on agreement by the defendant not to sue for malicious prosecution or false imprisonment; but having regard to the matters above stated, 1. 2. 3. this agreement cannot be regarded as legal; and by the Prosecution of Offences Act, 1879 (42 & 43 Vict. c. 22), s. 5, it is the duty of the clerk of every petty sessional Court, where a prosecution is withdrawn, or not proceeded with in reasonable time, to send a copy of the information and depositions to the DIRECTOR OF PUBLIC PROSECUTIONS.

6. The right of the Attorney-General to cause entry of a *nolle prosequi* is not affected by any of the rules laid down in the preceding paragraphs.

Hypnotism.—The phenomena of hypnotism have not yet, it is believed, been brought judicially before any English Court of law. They have, however, formed the subject of exhaustive discussion among English, American, and Continental medical jurists, and several cases turning upon them have come before American and Continental Courts, *e.g.* the *Czynski* case, 1894, *N. Y. Med. Leg. Jo.* vol. xiii. at p. 51, and vol. xiv. at

p. 150, where the facts are stated and considered; and the notorious *Eyraud* case in Paris. The chief medico-legal questions to which hypnotism gives rise, are—(1) the capacity of hypnotic subjects to make wills, to contract, to marry, and to give evidence: (2) the degree of credibility which the testimony of such subjects possesses: and (3) how far there is danger of them receiving and acting upon criminal suggestions. On this last point there is an important controversy between two schools of Continental thought, that of Liégois, according to whom such danger exists, and that of Benedikt, who practically denies its existence altogether. Probably the real solution of the difficulty lies in a *viâ media*. There is, no doubt, force in the staple criticism urged by the school of Benedikt against the conclusion of Liégois, that it is one thing to induce a subject to commit imaginary, and another thing to induce him to commit real, crimes. But, on the other hand, this criticism postulates subjects who are normally under the government of moral principle, and it is difficult to deny the possibility of criminal suggestions being successfully made to persons who are not controlled by the moral sanction at all. When, however, the question of hypnotism and crime is definitively raised in this country, the law as to the criminal responsibility of the insane (as to which see the article LUNACY) will be found adequate, with the necessary modifications and adjustments, to its solution. There do not seem to be any further difficulties connected with hypnotism which cannot, so far as legal considerations are concerned, be solved, when the time comes, by the ordinary law of UNDUE INFLUENCE.

[*Authorities.*—See the article "Hypnotism" in Hack Tuke's *Dictionary of Psychological Medicine*, and authorities there cited; Moll on *Hypnotism*, and Kingsbury on *Hypnotic Suggestion*.]

Hypothecation.—See MORTGAGE; SHIP.

Hypothèque (Fr.)—A word met with in cases dealing with foreign law, the equivalent of, but not identical with, mortgage (*q.v.*). It is simply a preferential charge, unsecured by possession real or fictitious, and thus involving no conveyance to the mortgagee, equity of redemption, or foreclosure; realisation is effected by public sale. Priority results from the date of registration (inscription). Under French law moveable property cannot form the subject-matter of a mortgage, and bills of sale are unknown (see *Civil Code*, arts. 2114 *et seq.*).

Ice.—See ACT OF GOD; AFFREIGHTMENT; FROST.

Identification—Proof in a legal proceeding that a person, document, or other thing is that which it is alleged to be.

Identity.—The identity of a person, document, or thing if in issue must be proved by some person who was acquainted at first hand with the person or thing, or is able as attesting witness or otherwise (28 & 29 Vict. c. 18, s. 7) to authenticate the document as genuine and as emanating from

the person whose it purports to be. This rule is subject to exception in pedigree cases, with respect to the identity of persons who are dead and were not personally known to any available living witness (Steph. *Evidence*, art. 36).

Persons.—It is the practice of the police where they have in custody a person suspected of crime or possession of goods supposed to have been criminally or unlawfully obtained to place the prisoner among persons of a similar appearance, and the goods with other like goods, and ask the prosecutor or other person to pick out the person or goods.

All prisoners convicted or unconvicted may be photographed or their anthropometric measurements taken with a view to verifying their identity in future criminal proceedings (34 & 35 Vict. c. 112, s. 6; 39 & 40 Vict. c. 23, s. 2; 54 & 55 Vict. c. 69, s. 8). The Home Office has made regulations on the subject (March 15, 1877 (St. R. & O., Rev., vol. v. p. 657), and June 20, 1896 (St. R. & O. 1896, No. 762)). They have to be laid before Parliament. Neither the Acts nor the Regulations make the photograph or measure evidence, but it is frequently used to establish identity in subsequent prosecutions, and the procedure appears to have been contemplated and to be lawful and regular (*Beamish* v. *Beamish*, 1876, Ir. Rep. 10 Eq. 413; *R.* v. *Tolson*, 1864, 4 F. & F. 73).

Identification by reference to photographs is permitted in divorce cases where the person to be identified cannot be brought before the Court to be confronted with the witness. But this mode of proof is narrowly watched, as in the case of *testes lupanares* it would be very dangerous (*Frith* v. *Frith*, [1896] Prob. 74).

Where the identity of parties to an action is called in question, the solicitor may be called to identify his client as party to any affidavit or pleading filed therein (Taylor, 8th ed., s. 935).

Collateral facts not otherwise relevant are admissible to show the identity of a person accused of crime or to rebut an *alibi* (Taylor, 8th ed., ss. 336, 337).

Presumptions in favour of identity are made from identity of name or from replies in correspondence (Taylor, 8th ed., ss. 1856–1860).

Goods.—In the case of goods, if a question of identity arises it is usual to produce the articles in Court and let the jury judge by their own senses; but witnesses may be called who have seen the goods and can give their opinion as to whether they are the goods in question (Taylor on *Evidence*, 8th ed., ss. 555 *a*, 1867–1878).

Where in an indictment an allegation is made descriptive of the identity of some thing it must as a general rule be proved as made subject to the power to amend (14 & 15 Vict. c. 100, s. 1), where the discrepancy between allegation and proof is not essential (Archb. *Cr. Pl.*, 21st ed., 247).

Documents.—Where identification of a document depends on questions as to handwriting, the evidence admissible is that of a man who knows the handwriting of the person alleged to have written or signed it or who is an expert in or experienced in handwriting, and comparison of authentic writings of the supposed writer is permitted (see 28 & 29 Vict. c. 18, s. 8; *R.* v. *Silverlock*, [1894] 2 Q. B. 766; Taylor, 8th ed., ss. 1416, 1867–1873).

In the case of documents, such as wills, deeds, etc., it is essential to prove the identity of the signatory with the testator or person as whose will or document it is tendered.

In the case of judgments and depositions or signed statements, the parties to the judgments and the deponents, etc., must be identified to render them admissible against the person against whom they are tendered

(Taylor, ss. 467–469, 892, 1684–1710). See EVIDENCE; and MEDICAL JURISPRUDENCE.

Idiot.—*Definition of Term.*—The term "idiot" (Gr. *ἰδιος*, a private person, one who does not hold any public office, and *ἰδιώτης*; Latin *idiota*, an ignorant and illiterate person) is defined by Coke (*Beverley's* case, 1 Jac. I. 4 Co. Rep. 124) as one "who from his nativity, by a perpetual infirmity, is *non compos mentis*," and by Hale (1 P. C. 29) as "fatuity *a nativitate vel dementia naturalis*." The differentiating mark between idiocy and lunacy is that the former is a natural (*a nativitate*) while the latter is an acquired or supervening (*accidentalis, adventitia*) incapacity. It should be noted, however, that the word "lunatic" in sec. 341 of the Lunacy Act, 1890, includes "idiot" where not inconsistent with the context. For further information as to the distinctive terminology of the law of lunacy, see the article LUNACY.

Criteria of Idiocy.—Several of the old writers attempted to determine the presence or absence of idiocy for legal purposes by arbitrary tests, such as a capacity to count twenty pence (Fitzherbert, *N. B.* 233, and cp. Staund, *Pr. Reg.* 34), or to measure a yard of cloth (Swinburne, *Testaments*, 69). But as Hale points out, these criteria are merely valuable as "evidences" (1 P. C. 29), and the question of idiocy or non-idiocy is one of fact. It would probably be determined now by a standard similar to that which is adopted with reference to lunacy, namely, capacity or incapacity in regard to the particular matter or class of matters which brings the mental condition of the alleged idiot *sub judice*.

There is no direct authority for this proposition. But it is supported by what has taken place in regard to deaf, and blind and deaf, mutes, who are in law presumed to be idiots (*Co. Lit.* 42 (*b*)), but as to either of which classes the presumption may now be rebutted. See article DEAF AND DUMB PERSONS, vol. iv. at p. 114.

Most of the questions of civil and criminal law which arise in connection with idiocy cannot properly be separated in treatment from those which arise in connection with LUNACY, and are accordingly dealt with under that head. There are, however, certain special statutory provisions with reference to idiots which must be noticed here.

Criminal Idiots.—The Criminal Lunatics Act, 1838, 1 & 2 Vict. c. 14, provides for the apprehension of dangerous idiots, likely to commit indictable offences. See as to these provisions, the article ASYLUMS, vol. i. at p. 393.

Hospitals, etc., for Idiots.—The Idiots Act, 1886, 49 & 50 Vict. c. 25—a statute whose provisions were originally included in the Lunacy Act, 1885, but were afterwards embodied in a separate measure in accordance with a generally expressed desire—provides for the admission into hospitals, institutions, and licensed houses of idiots and imbeciles, and for their care, education, and training therein. For the purposes of the Act "idiots" or "imbeciles" do not include lunatics (s. 17). The Act does not extend to Scotland or Ireland (s. 2). An idiot or imbecile from birth, or from an early age, may, if under age, be placed by his parents or guardians, or by any person undertaking and performing towards him the duty of a parent or guardian, and, until of full age, detained in any hospital, institution, or licensed house registered under the Act for the care of idiots or imbeciles, upon the certificate (see Sched. Form 1) of a medical practitioner (for definition of, see sec. 341 of the Lunacy Act, 1890) that the person to whom the certificate relates is capable of receiving benefit from such hospital,

etc., accompanied by a statement of particulars by the guardian, etc. (s. 4).

Provision is also made for the retention and admission of idiots and imbeciles after full age with the consent in writing of the Commissioners in Lunacy (s. 5), as to whom, see article ASYLUMS, vol. i. at p. 381. The Commissioners may at any time make an order for the discharge of any inmate of these institutions (s. 6). Notices of reception are to be sent to the Commissioners in Lunacy within fourteen days. *Semble*, the time would be reckoned exclusively of the day of reception and inclusively of the last day. See Rules in Lunacy, 1892, r. 7. Notices of death or discharge are to be sent to the Commissioners forthwith (see FORTHWITH) (s. 10). There are also provisions for inspection by the Commissioners once at least in every twelve months (s. 12), for the keeping of a medical journal (as to which, see the Commissioners Rules, 1895, r. 1 (1) (*d*)) in every hospital (s. 13), for the residence of a medical practitioner in such hospitals, etc. (s. 14), saving the rights of guardians to send pauper idiots or imbeciles to such hospitals and receive parliamentary grants in respect of such patients (s. 16), and enabling the committee of management to grant superannuation allowances (s. 11). Registration may be obtained on application by the managing committee or principal officer of the hospital, etc., to the Commissioners in Lunacy, and no idiot or imbecile can be received till after a certificate of registration has been granted (s. 7). Applications should be addressed to the Secretary, Commissioners in Lunacy, 19 Whitehall Place, London, S.W., and should be marked on the left hand upper corner "Idiots Act, 1886" (41st Report Commissioners in Lunacy, Appx. P. p. 371). Certain provisions of the Lunacy Acts, 1890–91, do not apply to this Act, namely, those relating to (*a*) the registration and regulation of hospitals, asylums, and licensed houses; (*b*) the orders, certificates, or reports necessary for the reception, etc., of lunatics; (*c*) care, treatment, and visitation of lunatics; (*d*) the books to be kept and reports to be made concerning lunatics (s. 11). As to these, see article ASYLUMS, *passim*.

[*Authorities.*—Archbold's *Lunacy*, 5th ed., 1894; Wood Renton on *Lunacy*, 1896; and as to criteria of idiocy, Pope on *Lunacy*, 2nd ed.]

Idle and Disorderly Person.—See VAGRANT.

If.—The word "if" in a stipulation generally creates a condition precedent. See *Bromfield* v. *Crowder*, 1 Bos. & Pul. N. S. 313 and 926, and other cases cited in Stroud, *Jud. Dict.*; see also WHEN. The words "if they shall think fit" do not dispense with the necessity for the exercise of a judicial discretion. See *R.* v. *Boteler*, 1864, 33 L. J. M. C. 101. For other juxtapositions of "if," see such headings as NECESSARY, POSSIBLE, REQUIRED.

Ignoramus.—See JURY, *Grand Jury*; INDICTMENT.

Ignorance of Fact and Law.—See MAXIMS, LEGAL (*Ignorantia juris*); MISTAKE.

Illegal Employment.—See ILLEGAL PRACTICES.

Illegal Hiring.—See ILLEGAL PRACTICES.

Illegality—As to effect of, on contract, see CONTRACT, *Unlawful Agreements*, vol. iii. p. 347. See also CONDITIONS, vol. iii. p. 255.

Illegal Payments.—See ILLEGAL PRACTICES.

Illegal Practices.

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I. ILLEGAL PRACTICES AT PARLIAMENTARY ELECTIONS.

MEANING AND NATURE OF ILLEGAL PRACTICES.—Illegal practices are certain offences in relation to elections which are forbidden by the Corrupt and Illegal Practices Prevention Acts, 1883 and 1895 (46 & 47 Vict. c. 51 and 58 & 59 Vict. c. 40). In the case of an illegal practice the offence consists in the doing of the prohibited act; the motive or intention with which the act was done is immaterial. An illegal practice is thus distinguish-

able from a corrupt practice, to the commission of which a corrupt intent is an essential (see CORRUPT PRACTICES). An illegal practice is an act prohibited by the Legislature, whether it be done honestly or dishonestly, the question involved being not one of intention, but whether, in point of fact, the enactments have been contravened (see *Barrow-in-Furness*, 1886, 4 O'M. & H. 77; *Walsall*, 1892, *ibid.* 129).

Certain acts and payments in relation to parliamentary elections were for the first time forbidden and made illegal practices by the Corrupt and Illegal Practices Prevention Act, 1883. The making or publishing of any false statement of fact as to the personal character or conduct of a candidate for the purpose of affecting the return was subsequently made an illegal practice by the Corrupt and Illegal Practices Prevention Act, 1895, entailing the same consequences as regards loss of seat, penalties, and incapacities as the illegal practices under the Act of 1883.

An illegal practice avoids an election, and involves certain penalties and incapacities, but where committed inadvertently or accidentally provision is made for obtaining relief (see *post* under the head RELIEF FROM THE CONSEQUENCES OF ILLEGAL PRACTICES, ETC.; see also the article RELIEF). It should, moreover, be observed that some illegal practices avoid an election when committed by the candidate or any of his agents (see AGENCY (ELECTION)), others avoid an election only when committed by the candidate or his Election Agent, including the sub-agent in each polling district (see ELECTION AGENT).

In addition to illegal practices the Corrupt and Illegal Practices Prevention Act, 1883, created the offences of Illegal Payment, Illegal Employment, and Illegal Hiring, which do not avoid the election unless committed by the candidate himself, or by his Election Agent or sub-agents (see C. & I. P. P. Act, 1883, ss. 21 (2) and 25 (2)), but subject the offender to penalties.

The offences of Illegal Payment, Illegal Employment, and Illegal Hiring are not strictly illegal practices, but such offences become illegal practices and avoid the election when committed by the candidate himself or by his Election Agent, it being provided that a candidate or the Election Agent of a candidate who is personally guilty of an offence of illegal payment, employment, or hiring, is guilty of an illegal practice (see C. & I. P. P. Act, 1883, s. 21 (2)). It is, therefore, convenient to include an account of these offences in this article.

As to the commencement of a candidate's liability for illegal practices, see AGENCY (ELECTION); CANDIDATE; ELECTION EXPENSES.

Illegal Practices, and Illegal Payment, Employment, and Hiring are offences punishable on summary conviction, and are not indictable offences.

The various acts and omissions constituting these offences will now be considered in detail.

Payments for Conveyance of Voters to Poll.—The making of any payment, or contract for payment, for the purpose of promoting or procuring the election of a candidate at an election, on account of the conveyance of electors to or from the poll, whether for the hiring of horses or carriages or for railway fares or otherwise, is prohibited (C. & I. P. P. Act, 1883, s. 7 (1) (*a*)); and, subject to such exception as may be allowed in pursuance of the Act, if any such payment or contract for payment is knowingly made in contravention of the section, either before, during, or after an election, the person making the same is guilty of an illegal practice, and any person receiving such payment or being party to such contract knowing the same to be in contravention of the Act, is also guilty of an illegal practice (*ibid.* s. 7 (2)).

As to the construction of the words "knowingly made in contravention of this section," see *Pontefract*, 1893, Day's El. Cas. 62.

In a recent case certain payments made on behalf of the respondent in respect of stabling and baiting horses sent from a distance, for the purpose of conveying voters to the poll, were held to be payments made on account of the conveyance of electors to or from the poll within the meaning of the section (*Lichfield*, 1895, 5 O'M. & H. 30).

The payment of any sum, however small, for the conveyance of a voter to the poll or from the poll will avoid an election, but the Court has power to grant relief when it comes to the conclusion that a particular offence was of a trivial, unimportant, and limited character (see *Southampton*, 1895, 5 O'M. & H. 20; see also *post* under the head RELIEF FROM THE CONSEQUENCES OF ILLEGAL PRACTICES, ETC.: and the article RELIEF).

But payment on account of the conveyance of voters by sea is lawful in certain cases, it being expressly provided that, where the nature of a country is such that any electors residing therein are unable at an election for the county to reach their polling place without crossing the sea or a branch or arm of the sea, the Act is not to prevent the provision of means for conveying such electors by sea to their polling places (C. & I. P. P. Act, 1883, s. 48). The amount of payment for such means of conveyance may be in addition to the maximum amount of expenses allowed by the Act (*ibid.*; see also ELECTION EXPENSES).

A charge in a petition of an illegal practice under sec. 7 of the Corrupt and Illegal Practices Prevention Act, 1883, must allege that the offence was committed by the candidate, or his Election Agent or sub-agent. Where an offence of illegal hiring under sec. 14 of the Act is charged in the petition the Court will not amend the petition at the trial so as to form a charge under sec. 7 (see *Manchester*, 1892, 4 O'M. & H. 121).

Any corrupt promise to pay, or payment of, the expenses of the conveyance of voters to the poll in consideration of their voting for a particular candidate would amount to bribery (see *Cooper* v. *Slade*, 1858, 6 H. L. 746).

Payments for Exhibition of Addresses, Bills, or Notices.—The making of any payment, or contract for payment, for the purpose of promoting or procuring the election of a candidate at any election, to an elector on account of the use of any house, land, building, or premises, for the exhibition of any address, bill, or notice, or on account of the exhibition of any address, bill, or notice, is prohibited (C. & I. P. P. Act, 1883, s. 7 (1) (*b*)). Subject to such exception as may be allowed in pursuance of the Act, if any payment or contract for payment is knowingly made in contravention of the section, either before, during, or after an election, the person making the same, and any person receiving such payment, or being a party to any such contract, knowing the same to be in contravention of the Act, are guilty of illegal practices (*ibid.* s. 7 (2)). There is, however, this exception, that where it is the ordinary business of an elector as an advertising agent to exhibit for payment bills and advertisements, a payment to, or contract with, him is not to be deemed to be an illegal practice (*ibid.* s. 7 (3)).

For decisions as to what is an address, bill, or notice, see *Stepney*, 1886, 4 O'M. & H. 52; see also *Barrow-in-Furness*, 1886, *ibid.* 76; *Pontefract*, 1893, Day's El. Cas. 126.

As to the allowance of exceptions in pursuance of the Act, see *post* under the head RELIEF FROM THE CONSEQUENCES OF ILLEGAL PRACTICES, ETC.; see also the article RELIEF.

Payments for Excessive Number of Committee Rooms.—The making of any payment, or contract for payment, for the purpose of promoting or procuring

the election of a candidate, on account of any committee room in excess of the number allowed by the Act is prohibited (C. & I. P. P. Act, 1883, s. 7 (1) (*c*)). Subject to such exception as may be allowed in pursuance of the Act, if any such payment or contract for payment is knowingly made in contravention of the section, either before, during, or after an election, the person making the same is guilty of an illegal practice, and any person receiving such payment, or being party to any such contract, knowing the same to be in contravention of the Act, is also guilty of an illegal practice (*ibid.* s. 7 (2)). The number of committee rooms allowed is in a county one central committee room, and in addition a number of committee rooms not exceeding one for each polling district in the county, and, where the number of electors in a polling district exceeds five hundred, one additional committee room for every complete five hundred electors over and above the first five hundred. In a borough one committee room, and, if the number of electors in the borough exceeds five hundred, then a number not exceeding one for every complete five hundred electors, and if there is a number of electors over and above any complete five hundred or complete five hundreds, then one committee room for such number although not amounting to a complete five hundred (*ibid.* Sched. I, Part II.).

The Act only limits the number of committee rooms for which payment may be made: there is no restriction as to the use of rooms as committee rooms where no expense is incurred.

Whether a room is used as a committee room is in each case a question of fact to be determined by the circumstances. The Act of 1883 provides that the expression "committee room" is not to include any house or room occupied by a candidate at an election as a dwelling by reason only of the candidate there transacting business with his agents in relation to the election; nor is any room or building to be deemed to be a committee room for the purposes of the Act by reason only of the candidate or any of his agents addressing electors, committee-men, or others therein (see s. 64). Beyond this there is no definition of a committee room.

In a recent case where a candidate had taken a house in the constituency, and had built at the farther end of the yard a room which he had furnished as a club-room, and which he had allowed the Radical Association to use as a club for its meetings, and during the election it was used as a committee room, the candidate paid all the expenses in connection with the room and did not include any of them in his return of election expenses, it was held that he had committed an offence in not returning such expenses (*Tower Hamlets*, 1896, 5 O'M. & H. 114). As to the allowance of exceptions, see *post* under the head Relief from the Consequences of Illegal Practices, etc.

The use of any room as a committee room on premises where intoxicating liquor or refreshment is sold, or in any public elementary school in receipt of an annual parliamentary grant, is illegal, and amounts to an illegal hiring (see s. 20; see also *post* under the head Illegal Hiring).

Expenses in excess of Maximum allowed.—No sum may be paid and no expense may be incurred by a candidate at an election or his Election Agent, whether before, during, or after an election, on account of or in respect of the conduct or management of the election in excess of the maximum allowed by the Corrupt and Illegal Practices Prevention Act, 1883 (see *ibid.* s. 8 (1)). Any candidate or Election Agent knowingly acting in contravention of this section is guilty of an illegal practice (*ibid.* s. 8 (2)). This provision is, however, subject to such exception as may be allowed in pursuance of the Act (see *ibid.* s. 8 (1); see also *post* under the head Relief from the Consequences of Illegal Practices, etc.; and see the article Relief).

As to the maximum amount of expenses allowed, and as to the commencement of a candidate's liability with regard to election expenses, see ELECTION EXPENSES; see also CANDIDATE; ELECTION AGENT. As to expenditure in excess of the legal maximum, see the judgments in *Shoreditch*, 1896, 5 O'M. & H. 69.

It should be observed that the provisions of the Corrupt and Illegal Practices Prevention Act, 1883, prohibiting the payment of any sums, and the incurring of any expense in excess of the maximum, do not affect the right of any creditor who when the expense was incurred was ignorant of its being in contravention of the Act (see *ibid.* s. 19).

Voting by Prohibited Persons.—Any person who votes, or induces or procures any person to vote, at any election, knowing that he or such person is prohibited, whether by the Act of 1883 or by any other Act, from voting at such election, is guilty of an illegal practice (C. & I. P. P. Act, 1883, s. 9 (1)).

But a candidate is not liable, nor will his election be avoided, for any such illegal practice committed by his agent other than his Election Agent or sub-agent (*ibid.* ss. 9 (3) and 25 (2); see also ELECTION AGENT).

In one case, where the Election Agent was charged with procuring persons who were disqualified to vote, it was said that it is incumbent on the agent who employs persons who are disqualified by being employed for payment at the election to warn them not to vote, but it was held that, although he did not take enough trouble to prevent them from voting, he did not actually procure them to vote, so that his conduct did not amount to an illegal practice (see *Stepney*, 1892, 4 O'M. & H. 178).

As to what persons are prohibited by statute from voting at elections, see the article FRANCHISE, ELECTORAL.

An elector who has within six months before or during any election been retained, hired, or employed for any of the purposes of the election for reward, by or on behalf of any candidate, as agent, clerk, or messenger, etc., is not entitled to vote at such election, and if he does vote is guilty of a misdemeanour (see Representation of the People Act, 1867, 30 & 31 Vict. c. 102, s. 11).

Publishing False Statement of Withdrawal of Candidate.—Any person who, before or during an election, knowingly publishes a false statement of the withdrawal of a candidate at such election for the purpose of promoting or procuring the election of another candidate, is guilty of an illegal practice (C. & I. P. P. Act, 1883, s. 9 (2)). But a candidate is not liable, nor will his election be avoided, for such an illegal practice committed by his agent other than his Election Agent or sub-agent (*ibid.* ss. 9 (3) and 25 (2); see also ELECTION AGENT).

Publishing Bill, etc., without Name and Address of Printer.—Every bill, placard or poster having reference to an election must bear upon the face of it the name and address of the printer and publisher (C. & I. P. P. Act, 1883, s. 18). Any person printing, publishing, or posting, or causing to be printed, published, or posted, any such bill, placard, or poster, which fails to bear upon the face of it the name and address of the printer and publisher, is, if he is the candidate or the Election Agent, guilty of an illegal practice, and any other person so doing is liable on summary conviction to a fine not exceeding £100 (*ibid.*).

The words "bill, placard, or poster" are not to be construed in a narrow sense (see *Barrow-in-Furness*, 1886, 4 O'M. & H. 78). No judicial definition of the meaning of the words has yet been attempted. See further as to the construction of the words, *Barrow-in-Furness*, 1886, 4 O'M. & H. 76.

In a municipal case, where a respondent received from his own servant at his residence a printed address and letter having reference to the election, and purporting to be signed by the appellant, a candidate, but without the printer's name and address thereon, it being proved that the document was printed for publication by instructions conveyed to the printer in a letter from the appellant's brother, who resided with him, and that the printer had debited the appellant with the cost of printing, but had not been paid, it was held that there was no evidence that the appellant printed or caused to be printed the document in question (*Bettesworth* v. *Allingham*, 1885, 16 Q. B. D. 44).

Payment of Election Expenses otherwise than through Election Agent.—No payment, advance, or deposit may be made by a candidate at an election, or by any other person on his behalf, at any time, whether before, during, or after the election, in respect of any expenses incurred on account of or in respect of the conduct or management of the election, otherwise than by or through the Election Agent of the candidate, and all money provided by any person other than the candidate for any election expenses, whether as gift, loan, advance, or deposit, must be paid to the candidate or his Election Agent, and not otherwise. But this does not apply to a tender of security to, or any payment by, the Returning Officer, or to any sum disbursed by any person out of his own money for any small expense legally incurred by himself, if such sum is not repaid to him (C. & I. P. P. Act, 1883, s. 28 (1)).

A person who makes any payment, advance, or deposit, in contravention of this section, or pays in contravention of the section any money so provided is guilty of an illegal practice (*ibid.* s. 28 (2)). The rule that all election expenses must be paid by or through the Election Agent is subject to some few exceptions. See ELECTION EXPENSES; see also *post* under the head RELIEF FROM THE CONSEQUENCES OF ILLEGAL PRACTICES, ETC. Relief has been granted in many cases where election expenses have been paid otherwise than through the Election Agent (see, for instance, *Norwich*, 1886, 4 O'M. & H. 89; *Stepney*, 1892, *ibid.* 182; and see the article RELIEF).

Payments by Election Agent improperly made.—Every payment by an Election Agent in respect of election expenses must, except when less than forty shillings, be vouched for by a bill stating the particulars, and by a receipt (C. & I. P. P. Act, 1883, s. 29 (1)). Every claim against a candidate at an election or his Election Agent, in respect of any election expenses which is not sent in to the Election Agent within the time limited, is barred, and must not be paid, and, subject to exceptions allowed in pursuance of the Act (as to which, see *post* under the head RELIEF FROM THE CONSEQUENCES OF ILLEGAL PRACTICES, ETC.), an Election Agent who pays a claim in contravention of this enactment is guilty of an illegal practice (*ibid.* s. 29 (2); as to the time for sending in claims, see ELECTION EXPENSES).

Payments by Election Agent after prescribed time.—All election expenses must be paid within the time limited by the Act, and not otherwise. Subject to exceptions allowed in pursuance of the Act (as to which, see *post* under the head RELIEF FROM THE CONSEQUENCES OF ILLEGAL PRACTICES, ETC.), an Election Agent making any payment after such time is guilty of an illegal practice (C. & I. P. P. Act, 1883, s. 29 (4); as to the time limited within which payments for election expenses may be made, see ELECTION EXPENSES). But where an Election Court reports that it has been proved that any payment made by an Election Agent in contravention of this section was made without the sanction or connivance of the candidate, the

election of the candidate is not void, nor is he subject to any incapacity under the Act by reason only of such payment having been made in contravention of the section (C. & I. P. P. Act, 1883, s. 29 (6)).

Omitting to make Return of Election Expenses.—The Election Agent of every candidate must, within thirty-five days after the day on which the candidates are declared elected, transmit to the Returning Officer a true return respecting the election expenses, and such return must be accompanied by a declaration made by the Election Agent in the form given in the Act. The candidate also must, at the same time or within seven days afterwards, transmit to the Returning Officer a similar declaration respecting the election expenses (see C. & I. P. P. Act, 1883, s. 33). If without some authorised excuse a candidate or an Election Agent fails to comply with the requirements of this section, he is guilty of an illegal practice (*ibid.* s. 33 (6); see also as to the form of return and declaration, and as to authorised excuse for not making the same, ELECTION EXPENSES).

As to payments for election expenses not included in the return, see *Lichfield*, 1895, 5 O'M. & H. 35; *Lancaster*, 1896, *ibid.* 44; *Shoreditch*, 1896, *ibid.* 69; *Tower Hamlets*, 1896, *ibid.* 115. In a recent case, an election was declared void on the ground that payments which ought to have been included in the election accounts had not been included in the return (*Lichfield*, 1895, 5 O'M. & H. 35).

False Statement of Fact as to Personal Character of Candidate.—Recent legislation has provided that the making or publishing, before or during any parliamentary election, of any false statement of fact in relation to the personal character or conduct of any candidate, for the purpose of affecting the return of any candidate at such election, shall be an illegal practice within the meaning of the provisions of the Act of 1883. And any persons who, or the directors of any body or association corporate which, makes or publishes any such statement, are subject to all the penalties for, and the consequences of, committing an illegal practice under the Act of 1883 (see the Corrupt and Illegal Practices Prevention Act, 1895, 58 & 59 Vict. c. 40, s. 1).

The object of the Corrupt and Illegal Practices Prevention Act, 1895, was to prevent persons making false statements which might influence an election. The statute was for the first time submitted to judicial interpretation in the election petition for the borough of Sunderland (1896, 5 O'M. & H. 53). Any false statement of fact, whether charging dishonesty, or merely bringing a man into contempt, if it affects or is calculated to affect the election, comes within the statute. Thus, as has been pointed out (see per Pollock, B., *Sunderland*, 5 O'M. & H. 62), "some perfectly innocent acts may be done by people, and yet they may come, if they are stated to be done in this way, within the Act. Supposing, for instance, any gentleman in a county constituency was to say of his adversary that he had shot a fox, and he said it for the purpose of working upon the minds of the constituency during an election, that would certainly come within the meaning of the Act. Again, if any person in a constituency, where one of the members was a temperance man, were to say that he had seen him drinking a glass of sherry—a perfectly innocent act—that would also bring him within the Act." Although in some sense it may be said that the words of the statute are not so wide as in the common law of libel, in some sense they are wider, and there is no doubt that words, although not imputing bad conduct against the candidate, may still come within the meaning of the statute (see *Tower Hamlets*, 1896, 5 O'M. & H. 104). Moreover, with regard to a

false statement of fact made in order to influence the election, the question as to whether there was malice cannot arise (see *Sunderland*, *ibid.* 62).

It will be observed that to constitute an illegal practice, the statement must be made or published before or during the election, for the purpose of affecting the return of any candidate at the election, and it must be a false statement of fact in relation to the personal character or conduct of such candidate. There is no doubt that one of the difficulties of the construction of the Act will be the determination in some cases whether the statements are statements of fact. Upon this point, in the *Sunderland* case (1896, 5 O'M. & H. 63), Pollock, B., said: "It is obvious to everybody that a mere argumentative statement of the conduct of a public man, although it may be in respect of his private life, is not always, and in many cases certainly would not be, a false statement of fact. In the present case, if one were not to look beyond the present words, I should consider very carefully before I held such words as a man paying 'wretched wages,' a man having 'cleverly shelved,' or being 'forced to do' a particular thing, or having sheltered himself under a 'Radical shuffle,' were facts which would bring the person who used them within the Act; but I certainly should not let the man who used those words go scot free unless I had carefully considered all the surrounding circumstances, such as who used them, to whom he used them, the meaning they were supposed to bear, and all the other circumstances of the case."

It is, however, expressly provided in the statute (s. 2), that no person is to be deemed to be guilty of an illegal practice if he can show that he had reasonable grounds for believing, and did believe, the statement made by him to be true. What is a reasonable ground for believing a statement is a question to be determined by the judges on the trial of an election petition from the character of the statement and the circumstances of the case (as to this, see *Sunderland*, 1896, 5 O'M. & H. 64 and 65; see also *Tower Hamlets*, 1896, *ibid.* 105).

Moreover, a candidate will not be liable, nor subject to any incapacity, nor will his election be avoided, for any illegal practice under the Corrupt and Illegal Practices Prevention Act, 1895, committed by his agent other than his Election Agent, unless it can be shown that the candidate or his Election Agent has authorised or consented to the committing of the illegal practice by such other agent, or has paid for the circulation of the false statement constituting the illegal practice, or unless upon the hearing of an election petition the Election Court find and report that the election of such candidate was procured or materially assisted in consequence of the making or publishing of such false statements (C. & I. P. P. Act, 1895, s. 4; see also *Sunderland*, 1896, 5 O'M. & H. 66 and 67).

It should also be mentioned that any persons making or publishing any false statement of fact within the Act of 1895 may be restrained by interim or perpetual injunction by the High Court, from any repetition of such false statement, or any false statement of a similar character, in relation to such candidate, and for the purpose of granting an interim injunction *primâ facie* proof of the falsity of the statement is sufficient (see C. & I. P. P. Act, 1895, s. 3).

Illegal Payment.—*Providing Money for Illegal or Excessive Payment.*—Where a person knowingly provides money for any payment which is contrary to the provisions of the Corrupt and Illegal Practices Act, 1883, or for any expenses incurred in excess of any maximum amount allowed by that Act, or for replacing any money expended in any such payment or

expenses, except where the same may have been previously allowed in pursuance of the Act to be an exception, he is guilty of illegal payment (C. & I. P. P. Act, 1883, s. 13; as to what election expenses may be incurred, and as to the maximum expenditure, see ELECTION EXPENSES).

Providing Money for Corrupt Withdrawal.—Any person who corruptly induces or procures any other person to withdraw from being a candidate at an election in consideration of any payment or promise of payment, is also guilty of illegal payment, as, also, is any person withdrawing in pursuance of such inducement or procurement (C. & I. P. P. Act, 1883, s. 15).

Payment for Bands, Flags, Banners, Marks of Distinction, etc.—No payment or contract for payment may, for the purpose of promoting or procuring the election of a candidate at an election, be made on account of bands of music, torches, flags, banners, cockades, ribbons, or other marks of distinction (C. & I. P. P. Act, 1883, s. 16 (1)). Subject to such exception as may be allowed in pursuance of the Act (as to which, see *post* under the head RELIEF FROM THE CONSEQUENCES OF ILLEGAL PRACTICES, ETC.), if any such payment or contract for payment be made, either before, during, or after an election, the person making such payment is guilty of illegal payment, and any person being a party to any such contract or receiving such payment, is also guilty of illegal payment if he knew that the same was made contrary to law (*ibid.* s. 16 (2)).

No candidate before, during, or after any election, may in regard to such election by himself or by his agent directly or indirectly give, or provide, to or for any person having a vote at such election, or to or for any inhabitant of the county, city, borough, or place for which the election is held, any cockade, ribbon, or other mark of distinction, and every person so giving or providing is for every such offence to forfeit the sum of £2 to any person suing for the same, together with full costs of the suit (Corrupt Practices Prevention Act, 1854, 17 & 18 Vict. c. 102, s. 7). The giving or providing cockades, ribbons, or marks of distinction is thus prohibited, but there is no such prohibition of the giving or providing of bands of music, torches, flags, or banners, though, as above stated, any payment or contract of payment on account of them would be an illegal payment.

Payment on account of a band is illegal as soon as the election has begun, but payment for bands playing before the election is not illegal (*Hexham*, 1892, Day's El. Cas. 95).

In one case certain cards were ordered, supplied, paid for, and worn at the election as hat cards. It was held that they were marks of distinction, and the election was avoided on the ground of illegal payment (*Walsall*, 1892, 4 O'M. & H. 126). But cards which are not made or intended to be used as badges or marks of distinction, although they are capable of being used as such, and are in fact worn as hat cards, are not within the section (see *East Clare*, 1892, *ibid.* 162; see also *Pontefract*, 1893, *ibid.* 200).

Banners to be within the section must have been used as marks of distinction; broad strips of canvas with the name of the candidate upon them, which were stretched across different streets throughout the constituency, have been held to be banners within the meaning of the section (*Stepney*, 1892, *ibid.* 179); so also have pieces of linen, upon which were printed portraits of the candidate, which had been furnished with a lath at top and bottom, and which were carried about on sticks, and suspended by strings across the streets (see *Tower Hamlets*, 1896, 5 O'M. & H. 107). The words "marks of distinction" are not limited to the last two words preceding them, "cockades" and "ribbons," but flags and banners may also be marks of distinction (per Pollock, B., *ibid.* 109). A payment made to a

voter for repairs done by him to the roof of a house which had been damaged by ropes attached to flags or banners suspended across the street is not an illegal payment (*Stepney*, 1886, 4 O'M. & H. 39).

ILLEGAL EMPLOYMENT.—No person may for the purpose of promoting or procuring the election of a candidate at any election be engaged or employed for payment, or promise of payment, for any purpose or in any capacity whatever, except for any purposes or capacities mentioned in Sched. I. Parts I. and II. of the Act of 1883, or except so far as payment is therein authorised (C. & I. P. P. Act, 1883, s. 17 (1)). Subject to such exception as may be allowed in pursuance of the Act (see *post* under the head RELIEF FROM THE CONSEQUENCES OF ILLEGAL PRACTICES, ETC.), if any person is engaged or employed in contravention of this section, either before, during, or after an election, the person engaging or employing him is guilty of illegal employment, and the person so engaged or employed is also guilty of illegal employment if he knew that he was engaged or employed contrary to law (*ibid.* s. 17 (2)).

The Act allows the employment for payment of one Election Agent (see ELECTION AGENT); in counties one deputy Election Agent, known as a sub-agent, to act within each polling station; one polling agent in each polling station; and clerks and messengers limited in number according to the number of electors in the borough, county, or polling district (see Sched. I. Part I.; see also ELECTION EXPENSES; ELECTIONS). Certain expenses also are allowed to be incurred, some of which involve the employment of other persons (as to what these are, see Sched. I. Part II.; see also ELECTION EXPENSES).

The Act thus strictly limits the number of persons whom it is lawful to employ for payment at an election, and the employment of any person for payment beyond this limit is an illegal employment. So, therefore, where persons were hired for payment to keep order at election meetings, it was held to be an illegal employment (see *Ipswich*, 1886, 4 O'M. & H. 72), and the employment of canvassers for payment is an illegal employment (see CANVASSING).

The general purpose of sec. 17 is to keep down expenditure by prohibiting the employment of a larger number of persons than is mentioned in the schedule. The section would also probably prohibit the employment for money of an agent to perform additional duties to those which are indicated by his name or by his description; but in order to invalidate an election because an agent has performed duties additional to those for which he is expressly engaged, the case must be very clearly proved, and it is evident that it would always be extremely difficult to establish a case of that description of colourable employment of a man in one capacity in order that he might perform duties in another capacity (see *Elgin and Nairn*, 1895, 5 O'M. & H. 14). As to a polling agent acting as sub-agent, see *Elgin and Nairn*, 1895, *ibid.* 13; and as to persons employed for payment as clerks acting as canvassers, see *Lichfield*, 1895, *ibid.* 28.

ILLEGAL HIRING.—*Employment of Hackney Carriages, etc., for Conveyance of Voters.*—A person may not let, lend, or employ for the purpose of the conveyance of electors to or from the poll any public stage or hackney carriage, or any horse or other animal kept or used for drawing the same, or any carriage, horse or other animal which he keeps or uses for the purpose of letting out for hire. If he lets, lends, or employs such carriage, horse or other animal, knowing that it is intended to be used for the purpose of the conveyance of electors to or from the poll, he is guilty of an illegal hiring

(C. & I. P. P. Act, 1883, s. 14 (1)). And a person may not hire, borrow, or use for the purpose of the conveyance of electors to or from the poll any carriage, horse or other animal which he knows the owner thereof is prohibited to let, lend, or employ for that purpose; if he does so he is guilty of an illegal hiring (*ibid.* s. 14 (2)). But this does not prevent a carriage, horse, or other animal, being let to, or hired, employed, or used by an elector, or several electors at their joint cost, for the purpose of being conveyed to or from the poll (*ibid.* s. 14 (3)). And no one is liable to pay any duty or to take out a licence for any carriage by reason only of its being used without payment, or promise of payment, for the conveyance of electors to or from the poll at an election (*ibid.* s. 14 (4)).

Where a voter had driven to the poll in a cab, paying nothing to the driver, in the absence of proof that the voter knew that the use of the cab was prohibited by law the Court held that no breach of the section had been committed (*Buckrose*, 1886, 4 O'M. & H. 117).

A payment on account of the conveyance of voters to or from the poll amounts to an illegal practice (see *ante*; see also *Manchester*, 1892, 4 O'M. & H. 121).

Hiring or using Licensed Premises, Public Schools, etc.—The hiring or use of certain premises as committee rooms is also an illegal hiring, it being provided that (1) any premises on which the sale by wholesale or retail of any intoxicating liquor authorised by a licence, whether the licence be for consumption on or off the premises; or (2) any premises where any intoxicating liquor is sold or is supplied to members of a club, society, or association, other than a permanent political club; or (3) any premises wherein refreshment of any kind, whether food or drink, is ordinarily sold for consumption on the premises; or (4) the premises of any public elementary school in receipt of an annual parliamentary grant, or any part of any such premises, may not be used as a committee room for the purpose of promoting or procuring the election of a candidate at an election; and if any person hires or uses any such premises or any part thereof for a committee room he is guilty of illegal hiring, and the person letting such premises or part, if he knew it was intended to use the same as a committee room, is also guilty of illegal hiring (C. & I. P. P. Act, 1883, s. 20). But this does not apply to any part of such premises which is ordinarily let for the purpose of chambers or offices, or the holding of public meetings or of arbitrations, if such part has a separate entrance and no direct communication with any part of the premises on which any intoxicating liquor or refreshment is sold or supplied as aforesaid (*ibid.*).

Where the dwelling-house of a schoolmaster of a public elementary school in receipt of an annual parliamentary grant had been used as a committee room, and it was proved that the schoolroom and the master's house were severed in the sense of the walls being different, but that they were both within the same curtilage, it was held to be an illegal hiring or user within the meaning of the section (*Buckrose*, 1886, 4 O'M. & H. 113). But where a schoolhouse and premises were provided rent free by a subscriber to the schools, who was the owner of the premises and paid the rates, it was held that the use of the master's house by a committee was not illegal, as the house could not be said to be part of the premises of a public elementary school, although the managers were in receipt of the parliamentary grant (*ibid.* 115).

Prosecution for Illegal Practices, etc.—*Punishment of Illegal Practices on Summary Conviction.*—Illegal practices are punishable on

summary conviction, and may be prosecuted under the Summary Jurisdiction Acts (see C. & I. P. P. Act, 1883, s. 54 (1)). And an appeal lies to Quarter Sessions against such conviction (*ibid.* s. 54 (2)).

A person guilty of an illegal practice is, on summary conviction, liable to a fine not exceeding £100, and is incapable during a period of five years from the date of his conviction of being registered as an elector, or voting at any election, whether it be a parliamentary election or an election for a public office held for or within the county or borough in which the illegal practice has been committed (*ibid.* s. 10; as to the meaning of the expression "public office," see *ibid.* s. 64).

Any person charged with an illegal practice may be found guilty of that offence notwithstanding that the act constituting the offence amounted to a corrupt practice (*ibid.* s. 52).

A person guilty of an illegal practice at an election may not vote at such election, and if he votes his vote is void (*ibid.* s. 36).

Punishment of Illegal Payment, Employment, or Hiring.—The offences of illegal payment, illegal employment, and illegal hiring are also punishable on summary conviction, and may be prosecuted under the Summary Jurisdiction Acts (C. & I. P. P. Act, 1883, s. 54 (1)). A person guilty of an offence of illegal payment, employment, or hiring is, on summary conviction, liable to a fine not exceeding £100 (*ibid.* s. 21 (1)). An appeal lies to Quarter Session against such a summary conviction (*ibid.* s. 54 (2)). It is also provided that a candidate or an Election Agent of a candidate who is personally guilty of an offence of illegal payment, employment, or hiring shall be guilty of an illegal practice (*ibid.* s. 21 (2)).

Any person charged with illegal payment, employment, or hiring may be found guilty of that offence notwithstanding that the act constituting the offence amounted to a corrupt or illegal practice (*ibid.* s. 52).

A person guilty of illegal payment, employment, or hiring at an election may not vote at such election, and if he votes his vote is void (*ibid.* s. 36).

Prosecution for Illegal Practices before Election Court.—As to the attendance of the Public Prosecutor or his representative at the trial of an election petition, and as to his duties with regard to the prosecution of offenders, see ELECTION PETITION.

Where information is given to the Public Prosecutor that illegal practices have prevailed in reference to any election, it is his duty, subject to the regulations under the Prosecution of Offences Act, 1879, to make such inquiries and institute such prosecutions as the circumstances of the case appear to him to require (C. & I. P. P. Act, 1883, s. 45). At the trial of an election petition it is his duty to obey any directions given by the Election Court with respect to the prosecution of offenders (*ibid.* s. 43 (1)). It is also his duty, without any direction from the Election Court, if it appears to him that any person who has not received a certificate of indemnity has been guilty of an illegal practice, to prosecute such person for the offence before the Election Court, or, if he thinks it expedient, before any other competent Court (*ibid.* s. 43 (3); see also *ibid.* s. 57 (1); *Ipswich*, 1886, 4 O'M. & H. 75; *West Belfast*, 1886, *ibid.* 109). Where a person is prosecuted before an Election Court and he appears before the Court, the Court must proceed to try him summarily for the offence, and he is, if convicted thereof upon such trial, subject to the same incapacities as he is subject to upon conviction for the offence, and further may be adjudged by the Court to pay such fine as is fixed by the Act for the offence (C. & I. P. P. Act, 1883, s. 43 (4)).

Where a person so prosecuted does not appear before the Election Court, or if the Court thinks it expedient in the interests of justice that he should

be tried before some other Court, it may, if of opinion that the evidence is sufficient, order him to be prosecuted before a Court of summary jurisdiction for the offence (see *ibid.* s. 43 (5) and (6)).

A proceeding against a person in respect of an illegal practice or any other election offences must be commenced within one year after the offence was committed, or if it was committed in reference to an election with respect to which an inquiry is held by Election Commissioners, within one year of the commission of the offence, or within three weeks after the report of such Commissioners, whichever period last expires; but in any case within two years after the offence was committed (*ibid.* s. 51 (1)). The time so limited by sec. 51 is in the case of any proceeding under the Summary Jurisdiction Acts for any such offence, whether before an Election Court or otherwise, to be substituted for any limitation of time contained in such Acts (*ibid.*).

Prosecution by Attorney-General.—An Election Court or Election Commissioners when reporting that certain persons have been guilty of any illegal practice (see *post* under the head REPORT OF ELECTION COURT OR COMMISSIONERS AS TO ILLEGAL PRACTICES) must report whether those persons have or have not been furnished with certificates of indemnity, and the report must be laid before the Attorney-General, accompanied in the case of the Commissioners with the evidence on which it was based, with a view to his instituting a prosecution against such persons as have not received certificates of indemnity if the evidence should in his opinion be sufficient to support a prosecution (C. & I. P. P. Act, 1883, s. 60).

A person who has received a certificate of indemnity is exempt from prosecution for any election offence committed by him before the date of the certificate, and if any such prosecution be instituted against him the Court having cognisance of the case must, on proof of the certificate, stay the proceeding, and may in their discretion award him costs (*ibid.* s. 59 (2)). But a person receiving a certificate of indemnity is not relieved from any incapacity or from any proceeding to enforce such incapacity other than a criminal prosecution (*ibid.* s. 59 (3)). See further the article ELECTION PETITION.

REPORT OF ELECTION COURT OR COMMISSIONERS AS TO ILLEGAL PRACTICES. —*Report of Election Court.*— Where any charge is made in an election petition of any illegal practice having been committed at the election, upon the trial of the election petition the Election Court must report in writing to the Speaker as follows:—(1) Whether any illegal practice has or has not been proved to have been committed by or with the knowledge and consent of any candidate at the election, and the nature of such illegal practice; (2) the names of all persons, if any, who have been proved at the trial to have been guilty of any illegal practice; (3) whether illegal practices have, or whether there is reason to believe that illegal practices have, extensively prevailed at the election to which the petition relates; and (4) whether any candidate at the election has been guilty by his agents of any illegal practice in reference to the election (see the Parliamentary Elections Act, 1868, 31 & 32 Vict. c. 125, s. 11 (14), as extended to illegal practices by the Corrupt and Illegal Practices Prevention Act, 1883, s. 11; see also ELECTION PETITION).

This report must be under the hands of both judges, and if the judges differ as to the subject of a report to the Speaker they must certify that difference, and make no report on the subject on which they differ (see the Parliamentary Elections and Corrupt Practices Act, 1879, 42 & 43 Vict. c. 75, s. 2).

The following consequences ensue upon the report by the Election Court to the Speaker. If the report is that any illegal practice has been proved to have been committed in reference to the election by or with the knowledge and consent of any candidate at the election, that candidate is not to be capable of being elected to or sitting in the House of Commons for the county or borough for seven years next after the date of the report, and if he has been elected his election is to be void; and he is further to be subject to the same incapacities as if at the date of the report he had been convicted of such illegal practice (C. & I. P. P. Act, 1883, s. 11). If the report is that a candidate at the election has been guilty by his agents of any illegal practice in reference to the election, that candidate is not to be capable of being elected to or sitting in the House of Commons for the county or borough during the Parliament for which the election was held, and if he has been elected his election is to be void (*ibid.*).

Report of Election Commissioners.—Where a joint address of both Houses of Parliament represents to the Crown that an Election Court has reported to the Speaker that illegal practices have, or that there is reason to believe that illegal practices have, extensively prevailed at an election in any county or borough, Election Commissioners may be appointed to make inquiry into the existence of such illegal practices, and to report as to the same (see the Election Commissioners Act, 1852, 15 & 16 Vict. c. 57, amended by the Parliamentary Elections Act, 1868, and extended to include illegal practices by the Corrupt and Illegal Practices Prevention Act, 1883, s. 12; see also ELECTION COMMISSIONERS).

Consequences of Report of Election Court or Commissioners.—Every person who is reported by any Election Court or Election Commissioners to have been guilty of any illegal practice at an election is, whether he obtained a certificate of indemnity or not, subject to the same incapacity as he would be subject to if he had at the date of such election been convicted of the offence of which he is reported to have been guilty (C. & I. P. P. Act, 1883, s. 38 (5)). But a report of any Election Commissioners inquiring into an election for a county or borough is not to avoid the election of any candidate who has been declared by an Election Court on the trial of a petition respecting such election to have been duly elected, or render him incapable of sitting in the House of Commons for the said county or borough during the Parliament for which he was elected (*ibid.*).

It should be observed, however, that before any person, other than a party to an election petition or a candidate on behalf of whom the seat is claimed by an election petition, is reported by an Election Court, and before any person is reported by Election Commissioners, to have been guilty at an election of any illegal practice, the Court or Commissioners, as the case may be, must cause notice to be given to such person, and if he appears in pursuance of the notice must give him an opportunity of being heard by himself and of calling evidence in his defence to show cause why he should not be so reported (*ibid.* s. 38 (1); see also *R.* v. *Mansel Jones*, 1889, 23 Q. B. D. 29; *Hexham*, 1892, Day's El. Cas. 78; *Rochester*, 1892, *ibid.*; and see the articles ELECTION COMMISSIONERS; ELECTION PETITION). And any person reported by Election Commissioners to be guilty of illegal practices may appeal against such report to the next Assize Court (see C. & I. P. P. Act, 1883, s. 38 (2); see also ELECTION COMMISSIONERS).

RELIEF FROM THE CONSEQUENCES OF ILLEGAL PRACTICES, PAYMENT, EMPLOYMENT, OR HIRING.—Relief may be obtained on application to the High Court or an Election Court from the consequences of illegal

practices, illegal payment, employment, or hiring, where the offence was committed inadvertently or accidentally, and not from any want of good faith. Thus it is provided, by sec. 23 of the Corrupt and Illegal Practices Prevention Act, 1883, that where on application made it is shown to the High Court or an Election Court by such evidence as seems to the Court sufficient (1) that any act or omission of a candidate at an election, or of his Election Agent, or of any other agent or person, would, by reason of being a payment, engagement, employment, or contract, in contravention of the Act, or being the payment of a sum or the incurring of expense in excess of any maximum amount allowed by the Act, or of otherwise being in contravention of any of the provisions of the Act, be an illegal practice, payment, employment, or hiring; and (2) that such act or omission arose from inadvertence, or from accidental miscalculation, or from some other reasonable cause of a like nature, and, in any case, did not arise from any want of good faith; and (3) that such notice of the application has been given in the county or borough for which the election was held as to the Court seems fit: and under the circumstances it seems to the Court to be just that the candidate, and the Election Agent, or other agent and person, or any of them, should not be subject to any of the consequences under the Act of the said act or omission, the Court may make an order allowing such act or omission to be an exception from the provisions of the Act which would otherwise make the same an illegal practice, payment, or hiring, and thereupon such candidate, agent, or person is not to be subject to any of the consequences under the Act of the act or omission.

As to the practice in applications for relief, and as to the decisions with regard to the granting of relief, see the article RELIEF.

On the trial of an election petition the Election Court may, under certain circumstances, make a report exonerating the candidate in cases of illegal practices committed by his agents. Where the Election Court reports that a candidate has been guilty, by his agents, of illegal practices, and further reports that the candidate has proved to the Court that no corrupt or illegal practice was committed at the election by him or his Election Agent, and that the illegal practices mentioned in the report were committed contrary to his or his Election Agent's orders, and without their sanction or connivance, and that he and his Election Agent took all reasonable means for preventing the commission of corrupt and illegal practices at the election, and that the offences mentioned in the report were of a trivial, unimportant, and limited character, and that in all other respects the election was free from any corrupt or illegal practice on the part of such candidate and of his agents, then his election will not, by reason of the offences mentioned in the report, be void, nor will he be subject to any incapacity (see C. & I. P. P. Act, 1883, s. 22). For further information on this subject, see RELIEF.

II. ILLEGAL PRACTICES AT MUNICIPAL AND OTHER ELECTIONS.

MUNICIPAL ELECTIONS.—The offences of illegal practices, illegal payment, employment, and hiring at municipal elections are created and defined by the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, 47 & 48 Vict. c. 70. The provisions of that statute with regard to illegal practices are, to a large extent, simply a re-enactment of the Corrupt and Illegal Practices Act, 1883. The law with regard to illegal practices and illegal payment, employment, and hiring at municipal elections is,

therefore, to a great extent the same as at parliamentary elections. At a municipal election, however, no sum may be paid and no expense may be incurred by or on behalf of a candidate, whether before, during, or after an election, on account of or in respect of the conduct or management of such election, except at the election of councillors, and except in the case of a municipal election in the City of London (see M. E. (C. & I. P.) Act, 1884, ss. 5 (1) and 35; see also ELECTION EXPENSES). Any candidate, or agent of a candidate, or person who knowingly acts in contravention of this section (s. 5) is guilty of an illegal practice (*ibid.* s. 5 (2)).

The penalty for illegal practices and for illegal payment, employment, and hiring at municipal elections is the same as at parliamentary elections (see *ibid.* ss. 7 and 17).

An illegal practice within the meaning of the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, is (see s. 8 (1) of that Act) to be deemed to be an offence against Part IV. of the Municipal Corporations Act, 1882, and a petition alleging such illegal practice may be presented and tried accordingly (see ELECTION PETITION).

On the trial of a municipal election petition, the report as to illegal practices committed by a candidate or his agents must be made by the Election Court to the High Court (M. E. (C. & I. P.) Act, 1884, s. 8 (2)).

A municipal election will be avoided by the extensive prevalence of illegal practices, it being provided that where, upon the trial of an election petition respecting a municipal election for a borough or ward, it is found by the Election Court that illegal practices or offences of illegal payment, employment, or hiring, committed in reference to such election, for the purpose of promoting the election of a candidate at that election, have so extensively prevailed that they may be reasonably supposed to have affected the result of that election, the Election Court must report such finding to the High Court; and the election of such candidate, if he has been elected, is to be void, and he is not, during the period for which he was elected to serve, or for which, if elected, he might have served, capable of being elected to or holding any corporate office in the borough (*ibid.* s. 18).

As to the application of the Act of 1884 to municipal elections in the City of London, see *ibid.* s. 35.

The provisions of the Corrupt and Illegal Practices Prevention Act, 1895, under which the making or publishing of any false statement of fact in relation to the personal character or conduct of a candidate at a parliamentary election is an illegal practice (see *ante*) are limited to parliamentary elections, and do not extend to municipal or other elections.

SCHOOL BOARD ELECTIONS, ETC.—The provisions of the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, with regard to illegal practices at municipal elections, are, subject to the necessary modifications, extended to elections of members of Local Boards, Improvement Commissioners, Poor Law Guardians, and School Boards; and petitions may be presented and tried, and offences prosecuted and punished, and incapacities incurred in reference to each of such elections accordingly (Municipal Elections (Corrupt and Illegal Practices) Act, 1884, s. 36 and Sched. I.).

COUNTY COUNCIL ELECTIONS.—The same provisions, subject to the necessary modifications, are applied to County Council elections by the Local Government Act, 1888, 51 & 52 Vict. c. 41, s. 75 (see *Ex parte Walker*, 1889, 22 Q. B. D. 384).

Parish Council Elections, etc.—The same provisions are also extended by the Local Government Act, 1894, 56 & 57 Vict. c. 73, s. 48 (3) and (8)), to Parish Council elections and other elections under that Act, subject to adaptations, alterations, and exceptions, made by rules framed under the Act.

See also Agency (Election); Candidate; Canvassing; Corrupt Practices; Election Agent; Election Commissioners; Election Expenses; Election Petition; Elections; Relief; Registration; Returning Officer; Scrutiny; etc.

[*Authorities.*—Leigh and Le Marchant, *Law of Elections*, 4th ed., 1885; Mattinson and Macaskie, *Law relating to Corrupt and Illegal Practices*, 3rd ed., 1892: Rogers on *Elections*, 17th ed., vol. ii. (Parliamentary), 1895, vol. iii. (Municipal, etc.), 1894.]

Illness.—The meaning of "illness" comes into question in law in several connections, *e.g.* what degree of illness lets in proof of depositions at common law and by statute: when the illness of a witness is sufficient ground for the postponement of a trial. The subject is usually and more properly discussed under the heading Sickness, to which the reader is referred. As to the effect of illness on the performance of a contract, see Contract, vol. iii. at p. 348.

Illusory Appointments.—The first statutory alteration of the law relating to illusory appointments was made in 1830 by the Act 11 Geo. IV. and 1 Will. IV. c. 43. It is entitled "an Act to amend the law relating to illusory appointments." It enacted that no appointment which from and after the passing of the Act should be made in exercise of a power should be impeached in equity or at law as illusory by reason of giving only an unsubstantial or nominal share to any object of the power. It provided, however, that nothing in the Act should prejudice or affect any provision in any deed, will, or other instrument creating the power which declared the amount of the share from which no object of the power should be excluded; nor, on the other hand, should anything in the Act contained be deemed to give any other validity, force, or effect to any appointment than such appointment would have had if a substantial share of the property affected by the power had been thereby appointed to, or left unappointed to devolve upon, any object of the power. The enactments are retrospective and apply to powers *in esse* at the time of, but executed after, the passing of the Act (*Reid* v. *Reid*, 1858, 25 Beav. 469).

According to the old law, where a power of appointment was given to A. to appoint among a class in such shares as A. should direct, the presumed intention of the donor of the power was to give an actual and substantial share to each of the objects of the power. A., the appointor, could not, in exercising the power, exclude any one of the class—this would be an exclusive appointment and bad (see *Bulteel* v. *Plummer*, 1870, L. R. 6 Ch. 160). The whole theory is tersely stated by Jessel, M. R., in his judgment in *Gainsford* v. *Dunn*, 1874, L. R. 17 Eq. 405. Speaking of this interpretation of the intention, he says: "That was not according to the literal wording of the power, but it made sense of it; because if the appointment of a farthing would do, then on the principle of *de minimis non curat lex* it

would make every non-exclusive power an exclusive power. However, that doctrine was found inconvenient. . . ." The inconvenience arose from the obvious reason that it was impossible to determine without litigation what precise amount was or was not a substantial sum in accordance with the presumed intention of the donor of the power. The Act therefore put the question aside by making any share, though purely nominal, sufficient to make the exercise of the power non-exclusive. The process of reasoning that inspired this statutory change seems to have been that the *practical* exclusion of an object could not, like the *total* exclusion, owe its origin to an oversight or omission on the part of the appointor, and therefore it was not a proper case for any interference by a Court of equity. "One would have imagined," says Jessel, M. R., in the case quoted, "that the reasonable mode of altering the law would have been to make every power of appointment exclusive, unless the author of the settlement had pointed out the minimum share which every object was to get," instead of allowing an appointment to be impeached because the appointor omitted to appoint the necessary farthing. In the same year, 1874, the Statute 37 & 38 Vict. c. 37 rectified the anomaly by enacting that no appointment which, from and after the passing of the Act, shall be made in exercise of a power of appointment, shall be invalid at law or equity on the ground that any object of such power has been altogether excluded, but every such appointment shall be valid and effectual, notwithstanding that any one or more of the objects shall not thereby, or in default of appointment, take a share or shares of the property subject to the power. But the provisions of the Act are not to prejudice or affect any declaration in a deed, will, or other instrument fixing the amount or the share or shares from which no object of the power shall be excluded, or some one or more object or objects of it shall not be excluded.

Illustrations.—For the law of copyright in engravings and other illustrations, see title COPYRIGHT.

Illustrious—A title of honour bestowed by the Roman Emperors on officers of the Empire of the highest rank; and applied in later times as a prefix to the other designations of royal princes and certain other dignitaries. See EMINENCE; EXCELLENCY; HIGHNESS.

Images in Churches include paintings, pictures, and painted windows, but monuments, symbols, and ornaments are not included (see ORNAMENTS RUBRIC). An image is something representing a corporeal subject, or, according to Dr. Lushington, "a representation of anything that has, is, or might be supposed to live." Whether an image is lawful or not depends on the facts of each particular case. A statute (3 & 4 Edw. VI. c. 10 (1549)), still in force, ordered them all to be destroyed; but the law as laid down by the Privy Council is that images are lawful if set up for the purpose of decoration only and where they are not likely to lead to superstitious reverence.

The earliest legal references to the subject are at General Councils or Synods of the Church in A.D. 787 at Nice, and in A.D. 816 at a Synod held under Wilfred, Archbishop of Canterbury. See also *Ancient Constitutions* of Robert Winchelsea, Archbishop of Canterbury (1305), and of Thos. Arundel, Archbishop of Canterbury (1408), relating to their use (Gibs. *Cod.*).

No. 22 of the Thirty-nine Articles to which the clergy of the Church of England by 13 Eliz. c. 12 (1562) have to subscribe, has it that the Romish doctrines (among other things) concerning the worshipping and adoration of images are repugnant to Scripture. The first case on the subject is a case often referred to in early cases and called *Prickett's* case, 1600, in the reign of Elizabeth, and that case and two cases reported (Godb. 279 and Noy 104) in James I.'s reign, decide that it is unlawful to break or deface any superstitious pictures in any window in any church or aisle, unless it be by the ordinary, or with the licence of the ordinary. Sherfield, the recorder of Shrewsbury, was tried and convicted (1632) of breaking a painted glass window in the Church of St. Edmunds in that city, which represented God the Father, his defence being justification of his act (3 St. Tri. 519).

In an unreported case (1684)—*Cocke* v. *Tallent*—referred to on p. 330 in the case of *Boyd* v. *Phillpotts* (1874, L. R. 4 Ad. & Ec. 297), the then Dean of Arches decided that a faculty "for the better ornamentation of the church at Moulton, the erection of images of the apostles therein," had legally been granted by the surrogate of the chancellor of the diocese of Lincoln, and subsequently wrongly revoked by the chancellor. The present painted east window of St. Margaret's Church, Westminster (1761), was vehemently though unsuccessfully opposed, on the ground that thereon "is represented one or more superstitious pictures, and, more particularly, the painted image of Christ upon the Cross."

There seems to have been no other case until 1874 (*Boyd* v. *Phillpotts*, *ubi supra*), when the reredos in the cathedral at Exeter, erected by the dean and chapter, was questioned—a carved stone structure sculptured to represent in bas-relief the ascension, the transfiguration, and the descent of the Holy Ghost on the day of Pentecost, figures of angels, the screen surmounted by a cross. The Bishop of Exeter held the same to be illegal. The Court of Arches held the same to be legal, and that if it were illegal, the bishop could not order it to be removed. In *Clifton* v. *Ridsdale* (1 P. & D. 316)—known as the *Folkestone* case—a crucifix of metal in full relief standing on the top, in the centre of a screen of open ironwork at the entrance of the chancel of a church, turned towards the congregation, was held as not being an architectural decoration, but as being in danger of being an object of superstitious reverence, to be unlawful; and in the same judgment Lord Penzance considered pictures of stations of the Cross, unlawful, being connected with a set of devotions which he considered superstitious. The Privy Council upheld the decision as to the removal of the metal crucifix. In the *Denbigh* case (*Hughes* v. *Edwardes*, 1877, 2 P. D. 361), the bishop of the diocese refused to consecrate a church until the centre compartment of a reredos had been removed, which consisted of a sculptured panel representing the crucifixion, the figure of our Saviour on the Cross, the figures of St. John and the three Marys on either side, all in high relief. The Court of Arches, on a petition after consecration, ordered the same to be restored. The law on the subject is most likely now settled by the latest case (1889), *R.* v. *The Bishop of London* (24 Q. B. D. 213), known as the *St. Paul's Reredos* case. The dean and chapter of the cathedral having set up a reredos, comprising a figure 5 ft. high of our Lord upon the Cross, conspicuously above the communion table, a figure 5 ft. 6 in. high of the Virgin with the Child in her arms, conspicuously above the figure of our Lord, the bishop in accordance with secs. 8 and 9 of the Public Worship Regulation Act, 1874 (37 & 38 Vict. c. 85), having "considered the whole circumstances of the case," was of opinion that proceedings should not be taken, as the main question

of the principle at issue had already been decided in *Phillpotts* v. *Boyd* (*ubi supra*), it appearing impossible to say that the difference between the two erections was of grave importance, or that one offered temptations to idolatry and the other not. The Court of Appeal held that the bishop had not declined the jurisdiction given him by the Public Worship Regulation Act, and that he had full discretion and power over the matter.

Imbecile.—See IDIOT, and, as to the legal signification of the state "Imbecility," LUNACY.

Imitation.—This word is a term of art in various branches of industrial property, *e.g.* COPYRIGHT, DESIGNS, PATENTS, TRADE MARKS, to which headings reference may be made for the statutory provisions and cases on the subject. See also CALCULATED TO DECEIVE.

Immediate—

Approach.—Where a railway company, in carrying its line over a highway by means of a bridge, slopes away the road on each side of the bridge to give it the requisite height, the road thus sloped is not an "immediate approach" or a "necessary work connected" with the bridge within the meaning of sec. 46 of the Railway Clauses Act, 1845, so as to impose upon the railway company the obligation of maintaining the same (*Waterford and Limerick Rwy. Co.* v. *Kearney*, 1860, 12 Ir. C. L. R. 224; *Fosberry* v. *Waterford and Limerick Rwy. Co.*, 1862, 13 Ir. C. L. R. 494; followed in *London and North-Western Rwy. Co.* v. *Skerton*, 1864, 5 B. & S. 559).

Arrest.—A person is "immediately apprehended" within the meaning of sec. 103 of the Larceny Act, 1861, if he is arrested "then and there," or if that is impossible, in a pursuit immediately set on foot (*Griffith* v. *Taylor*, 1876, 2 C. P. D. 194, 202). See ARREST.

Expectancy.—In *Westcar* v. *Westcar*, 1856, 21 Beav. 328, where the Court had to construe a will by which the testator directed, *inter alia*, that the income of certain trust moneys should belong "to the person for the time being entitled in immediate expectancy," Sir John Romilly, M. R., said: "I think the person entitled in immediate expectancy is he who, if he lives long enough, will be first entitled to have the possession of the property."

Possession.—An offer to grant a lease with "immediate possession if required" does not point out the commencement of the term (*Rock Portland Cement Co.* v. *Wilson*, 1882, 52 L. J. Ch. 214).

Immediately.—This word means such convenient time as is reasonably requisite for doing the particular thing (*Pybus* v. *Mitford*, 1673, 2 Lev. 77; see also *R.* v. *Francis*, 1735, Ca. *temp.* Hardwicke, 115; *Toms* v. *Wilson*, 1863, 32 L. J. Q. B. 33, 382), that is, with all convenient speed (*Thompson* v. *Gibson*, 1841, 8 Mee. & W. 281). "It is impossible to lay down any hard-and-fast rule as to what is the meaning of the word 'immediately' in all cases. The words 'forthwith' and 'immediately' have the same meaning. They are stronger than the expression 'within a reasonable

time,' and imply prompt, vigorous action, without any delay, and whether there has been such action is a question of fact, having regard to the circumstances of the particular case" (per Cockburn, C.J., in *R.* v. *Berkshire Justices*, 1878, 4 Q. B. D. 471; see also *R.* v. *Aston*, 1850, 19 L. J. M. C. 236; and *In re Blues*, 1855, 5 El. & Bl. 291).

Where a person is found committing any offence punishable by the Larceny Act, 1861 (except the offence of angling in the daytime), he may be "immediately apprehended" without a warrant by any person and taken before a magistrate (s. 103). The meaning of "immediately" in this section was discussed in *Griffith* v. *Taylor*, 1876, 2 C. P. D. 194, where Cockburn, C.J., said: "'Immediately' is a strong word, and must, I think, be taken to mean 'then and there'; still it must receive a reasonable construction, and if arrest on the spot is impossible, and can only be effected by pursuit, if the pursuit is immediately set on foot, and so the party is arrested, then I think he would be 'immediately apprehended' within the meaning of this section, although the apprehension took place, not on the spot, but at some distance from it. But then in every case it must be a question of fact whether the apprehension is 'immediate' or not."

[*Authority.*—Stroud, *Jud. Dict.*]

Immemorial Usage—A custom or usage which has been in practice time out of mind, that is, in law, from before the commencement of the reign of Richard I. Prior to the Prescription Act, 1832, it was essential to the validity of a custom to show that it had been used from time immemorial, but this rule has been modified to a large extent by the statute mentioned, which enacts that claims to rights of common, etc., shall be sufficiently established by showing an uninterrupted enjoyment as of right, in some cases for thirty, in others for twenty, years. See CUSTOM; PRESCRIPTION.

Immeuble (Immoveable)—A term met with in cases affecting realty abroad, the equivalent more or less of real property. In French law, property is divided into moveables and immoveables. The following are summed up by the French Civil Code, arts. 516–526, as immoveables:—

Lands and buildings; windmills and watermills constructed on pillars and forming part of a building; ungathered crops and fruits; copse and forest trees (uncut); cattle leased to farmers for the cultivation of land; pipes used for conveying water; farming implements; seeds of such tenants as pay rent in kind; pigeons belonging to a pigeon-house; warren rabbits; beehives; fish in ponds; wine-making utensils; the implements necessary to the working of ironworks, paper-mills, and other factories; straw and manure; personal articles placed by the owner upon real estate to remain there in perpetuity (*i.e.* when fastened with plaster, mortar, or cement, so that they cannot be removed without being damaged or causing damage to the parts to which they are affixed), such as mirrors, pictures, or other ornaments when so fixed, and statues when placed in niches built specially to receive them. The following are regarded also as immoveables:—The usufruct of immoveable things; servitudes or land burdens; actions for the purpose of recovering real estate.

Immigration.—There is no law regulating or restricting immigration into the United Kingdom, except the Regulation of Aliens Act,

1836 (6 & 7 Will. IV. c. 11), which provides for the taking at all ports of the names and addresses of alien immigrants not having diplomatic immunity. The effect of the Act is statistical only. Returns of the number of aliens registered are laid before Parliament. Immigration from Scotland or Ireland into England is also uncontrolled, except by the power to remove Scotch and Irish paupers who have not obtained an English settlement. See POOR LAW.

Immorality—As to effect of, on contract, see CONTRACT, *Unlawful Agreements*, vol. iii. p. 347.

Immoveables.—"By a devise of immoveables do pass leases, rents, grass, and the like, but not any of those things that do pass by the devise of moveable; but debts will not pass by either of these devises" (Sheppard, *Touchstone*, 447). See also IMMEUBLE.

Imparcamentum—An old term for the impounding of cattle damage feasant. See DISTRESS, *Damage Feasant*.

Imparl; Imparlance.—Under the old law a defendant in a civil action was entitled before he pleaded to demand one imparlance or leave to speak with the plaintiff with the view of coming to an amicable settlement with him (3 Black. *Com.* 298).

Impeachment is the prosecution of a peer or commoner by the House of Commons at the bar of the House of Lords for treason, high crimes, or misdemeanours. Doubts have been entertained as to the liability of a commoner to impeachment for a capital offence (*Fitzharris* case, 1681, 13 L. J. 755; viii. St. Tri. 231), but the Lords in 1680 resolved to proceed on the impeachment of a commoner for high treason (Hatsall, iv. 428; 14 L. J. 260).

Impeachments began at the close of the reign of Edward III. (Pike, *Const. Hist. of House of Lords*, 205); they ceased between 1449 and 1621, during which time their place was filled by Acts of Attainder. Since 1621 there have been fifty-four cases of impeachment, forty-one in the seventeenth century, twelve in the eighteenth, and one in the nineteenth.

The procedure is simple. A member charges the accused with high crimes and misdemeanours, and moves that he be impeached. If this motion is carried, the member goes to the bar of the House of Lords and impeaches the accused. The Commons appoint a committee to draw up a case which, when formulated, is delivered to the accused, who may reply. They then appoint managers to conduct the case for the prosecution; the accused is taken into custody and handed to the care of Black Rod. The trial takes place in Westminster Hall, the Lord High Steward presiding if the accused is a peer; the Lord Chancellor or Speaker of the Lords, if he is a commoner. For an account of the course of an impeachment, see Lord Colchester's *Diary*, ii. 65, *et seq.*

The proceedings continue unaffected by a prorogation or dissolution (though Acts were passed in 1786 and 1805 to ensure this) until the case

is concluded, when the peers, each in turn, standing uncovered, with his right hand on his breast, answers on each charge "Guilty" or "Not Guilty," "upon my honour." Before judgment is given the bishops withdraw.

The Lords, if their verdict is "Guilty," do not pass sentence until the Commons demand judgment, and the execution of the sentence is subject to the exercise of the royal prerogative of mercy. But an antecedent pardon under the Great Seal is no defence (12 & 13 Will. III. c. 2, s. 3).

Impeachment has passed out of use. In the seventeenth century the Commons exercised no continuous control over ministers, nor could displace them from office if business was ill-conducted. A criminal proceeding in the Courts was not to be relied upon, when the king could appoint and dismiss judges at pleasure. Now, for ordinary mismanagement, loss of office is punishment enough; if a crime has been committed the Courts can be trusted. In *Lord Melville's* case the Commons first resolved to prosecute and then to impeach (Lord Colchester's *Diary*, ii. 9, 12).

[*Authorities.*—May, *Parliamentary Practice*, 10th ed., c. xxiv.; Pike, *Const. Hist. of House of Lords*, chs. x., xi.; Hallam, *History*, vol. ii. c. 12.]

Impeachment of Waste.—Every tenant for life, unless his estate is declared to be without impeachment of waste, is liable for committing waste, that is, for doing, or allowing to be done, anything to the estate to the injury of the persons next entitled. Thus, he may not cut timber (except so far as to furnish for his own use reasonable house-bote, plough-bote, and hay-bote), or pull down buildings, or plough up meadow-land, etc. If he does any of these things he will be liable in damages for same, and will be restrained from committing further waste. See WASTE; WITHOUT IMPEACHMENT OF WASTE.

Impediments to Marriage.—There are various impediments to the contracting of a lawful marriage; these are—(1) the existence of a prior undissolved (but see LICENCE; MARRIAGE) marriage; (2) relationship within the prohibited degrees (see PROHIBITED DEGREES); (3) want of sufficient age; (4) mental incapacity; (5) physical incapacity; (6) force, fraud, or error. For a full treatment of the subject, see title MARRIAGE.

Impending.—It was decided in *Grimston* v. *Turner*, 1870, 18 W. R. 724, that where, as the effect of a probate suit, the property of a testator was in such a position that no person had a legal right to deal with it, litigation was "impending," for something required to be done to obtain a decision as to who was the personal representative of the testator; and as litigation was so "impending," the Court made the usual order for the appointment of a receiver.

As to "impending danger" within the meaning of article 4 of the Board of Trade's Regulations regarding the use of steam or other mechanical traction for tramways, see *Jolly* v. *North Staffordshire Tramway Co.*, *Times*, 27th July 1887, and *Downing* v. *Birmingham and Midland Trams.*, 1888, 5 T. L. R. 40.

Imperial—Of or relating to an empire. This title, which originally belonged exclusively to the Holy Roman Empire, which was dissolved in

1806, has in modern times been in great measure treated as synonymous with royal, although strictly it denotes a title superior to the kingly dignity, as the proper meaning of emperor is the chief of a confederation of States some of which may have kings as their immediate rulers, as is the case in the present German Empire. In this country the title "imperial" has been little used till recent years. It is true that it occurs in the first article of the Act of Union between Great Britain and Ireland (39 & 40 Geo. III. c. 67), where it is, *inter alia*, provided "that the royal stile and titles appertaining to the *imperial* crown of the said United Kingdom and its dependencies . . . shall be such as His Majesty, by his royal proclamation under the Great Seal of the United Kingdom, shall be pleased to appoint"; but it was not until after the proclamation of the Queen as Empress of India in 1877, as empowered by the Royal Titles Act, 1876, that the term came more generally into use with us. Sometimes it is used to denote the whole of the United Kingdom as distinguished from any of the separate countries composing it, but more frequently it refers to the whole British Empire—the United Kingdom, colonies, and dependencies. In the latter sense it has been much employed of late years in connection with the subject of Imperial Federation and Imperial Defence (see the Imperial Defence Act, 1888).

Imperil.—One S. took a licence for a beerhouse in his own name on behalf of a woman whose property the business was, and agreed with the landlord not to do anything whereby the licence might be imperilled, on pain of forfeiting the tenancy and fixtures. He executed a declaration of trust in favour of the woman, and handed it to her with the licence indorsed in blank. S., who was a sailor, having gone away to sea, and, as it seemed, with the intention of abandoning the premises, the landlord immediately afterwards sought to enforce the forfeiture clause; but it was decided that the absence of S. did not cause the licence to be "imperilled," although, if the woman had carried on the business longer than would be required to make an application for a transfer of the licence to herself or someone else, the effect might be different (*Moore* v. *Robinson*, 1878, 48 L. J. Q. B. 156). See LICENSING.

Impertinence.—This was the expression formerly used in Chancery proceedings to denote that immaterial matter had been introduced into a pleading (see *Bally* v. *Williams*, 1825, 1 M'L. & Y. 334, 337; Mitford's *Pleading*, 5th ed., pp. 57, 372; and 1 Daniell's *Chancery Practice*, 5th ed., p. 292). Needless prolixity was often treated as constituting the defect of impertinence (*Slack* v. *Evans*, 1819, 7 Price, 278 *n.*; *Gompertz* v. *Best*, 1834, 1 Y. & C. Ex. 114), and repetitions of even material statements were sometimes considered as being open to the same objection (*Allfrey* v. *Allfrey*, 1851, 14 Beav. 235).

Impertinence did not afford any ground for demurrer, but the opposite party was entitled to have the impertinent matter expunged (see 1 Daniell's *Chancery Practice*, 5th ed., p. 292; 1 Sanders' *Orders in Chancery*, 1845 ed.). Formerly the mode of effecting this was by moving the Court to refer the pleading to a master to report upon it, and it was thereupon so referred without specifying the particular passages objected to; but this general form of reference having been found inconvenient in practice, the exceptions were by general orders in Chancery, dated the 8th of May 1845 and the

23rd of November 1850 (see 1 Sanders' *Orders in Chancery*, p. 998; 12 Beav. xxvii.), directed to be taken in writing and signed by counsel describing the particular passages alleged to be impertinent (see 1 Daniell's *Chancery Practice*, 5th ed., p. 292).

Taking exceptions to bills, answers, and other proceedings for impertinence was abolished by the Court of Chancery Procedure Act, 1852, but it was at the same time provided that the Court might direct the costs occasioned by any impertinent matter introduced into any proceeding to be paid by the party introducing the same (15 & 16 Vict. c. 86, s. 17).

The practice as regards the introduction of impertinent matter into pleadings is now dealt with by the rules in force under the Judicature Acts (see R. S. C., 1883, Order 19, rr. 2, 5, 27; Order 65, r. 27 (20) (22)). See STRIKING OUT.

Implements—"Things of necessary use in any trade or mystery which are employed in the practice of the said trade, or without which the work cannot be accomplished. And so also for furniture of household with which the house is filled. And in that sense you shall find the word often in wills and conveyances of moveables" (*Termes de la Ley*).

Implication.—This word in law bears its ordinary meaning of an inference, or something which may fairly be understood though not formally expressed.

Implied Authority.—See PRINCIPAL AND AGENT.

Implied Conditions.—See vol. iii. p. 255; and CAVEAT EMPTOR.

Implied Contracts.—See QUASI-CONTRACTS.

Implied Covenants.—See vol. iv. p. 14, as to Covenants in Leases; and see further, CONVEYANCING ACTS; FREEDOM FROM INCUMBRANCES; FURTHER ASSURANCE; QUIET ENJOYMENT; RIGHT TO CONVEY; SEISIN; BENEFICIAL OWNER.

Implied Trusts.—See TRUSTS.

Implied Warranty.—See WARRANTY.

Import—Goods brought into the country from abroad. The importation of certain goods, such as unauthorised reprints of copyright books, false coin, and indecent or obscene prints, is expressly forbidden, and with regard to certain other goods, such as wine, spirits, and tobacco, restrictions are imposed as to the place and manner of their importation.

On the arrival of a vessel from parts beyond seas, the master is required within twenty-four hours after arrival to make a report to the Customs authorities regarding his cargo and its consignee, and in addition the importer or his agent is required to give details as to the character, quantity, and value of the goods, whether they are liable to duty or not. Forms are provided applicable to the different cases of free and dutiable goods, and, with respect to the latter, whether the duty is to be paid at once on landing or whether the goods are to be warehoused. From the information thus collected by the Customs authorities are compiled the accounts (so far as dealing with imports) relating to the trade and navigation of the United Kingdom, which are periodically laid before Parliament by the Board of Trade. For full details as to the importation of goods, reference must be made to the Customs Consolidation Act, 1876, and the several Acts amending same.

Import for Sale.—The importing for sale by an unauthorised person into the British Dominions of books first composed or written or printed and published in any part of the United Kingdom, wherein there shall be copyright, and reprinted in any country or place out of the British Dominions, is prohibited by sec. 17 of the Copyright Act, 1842. The same section makes it an offence to "knowingly sell, publish, or expose to sale" such books, but the two offences are distinct by the addition of the word "knowingly" in the second case; and therefore a plaintiff who institutes proceedings in respect of a wrongful "importing for sale" is not required to give the defendant any notice, but may at once obtain an *ex parte* injunction; if, however, the proceedings are in respect of "knowingly selling," etc., notice of the nature of the copies complained of should properly be sent to the importer (*Cooper* v. *Whittingham*, 1880, 15 Ch. D. 501).

Impossibility.—A patent physical or legal impossibility avoids a contract (Anson, *Law of Contract*, 7th ed., pp. 79, 80). In the case of a contract for the sale of specific goods, if the goods, without the knowledge of the seller, have perished at the time when the contract is made, the contract is void (Sale of Goods Act, 1893, s. 6), either because it is impossible of performance, or on the ground of mutual mistake; the rule is apparently the same in other cases of antecedent impossibility (Anson, 321, 322), unless where there is an absolute promise to perform the contract (see the conflicting decisions of *Hills* v. *Sughrue*, 1846, 15 Mee. & W. 253, and *Clifford* v. *Watts*, 1870, L. R. 5 C. P. 577). Impossibility arising after the conclusion of an agreement for the sale of specific goods by their perishing without the fault of either party before the risk passes to the buyer, avoids the agreement (Sale of Goods Act, 1893, s. 7). In other cases, impossibility arising after the formation of a contract does not, in the general case, excuse the promisor from his performance, unless, indeed, his performance was to be conditional on its continued possibility; but impossibility arising from a change in the law will exonerate the promisor (*Baily* v. *De Crespigny*, 1869, L. R. 4 Q. B. 180); so also if the subject-matter of the contract is destroyed through no fault of his, if its continued existence is essential to the performance of the contract (*Taylor* v. *Caldwell*, 1863, 3 B. & S. 826). A contract by which a person is to render personal services is discharged by his death and perhaps also by illness incapacitating him for

performing his promise (*Robinson* v. *Davison*, 1871, L. R. 6 Ex. 269; Anson, 321–326). See CONTRACT.

Impotence.—See MEDICAL JURISPRUDENCE: NULLITY OF MARRIAGE.

Impotentiam, Propter (Property).—A person may have a qualified property in animals *feræ naturæ* on account of their own inability. For example, when hawks, herons, or other birds build in a person's trees and have young ones there, such person has a qualified property in the young birds till they can fly, when the property expires (2 Black. *Com.* 394).

Impound; Impounding.—See DISTRESS; POUND-BREACH.

Impression, First.—A case of first impression is one upon which there is no authority to guide the Court to a decision, and which therefore the Court has to decide according to what it thinks just and expedient.

Impressment. — From a very early date the Crown claimed a right to impress ships and seamen for the service of the Crown in war time (2 Stubbs, *Const. Hist.* 311–313). This claim is undoubtedly lawful (2 Pike, *Hist. Cr.* 271–273, 637), and is recognised by Statutes of 1379, 2 Rich. II. c. 4; 1556, 2 Phil. & Mary, c. 16; and 1563, 5 Eliz. c. 5, s. 26; *R.* v. *Tubbs*, 1776, 2 Cowp. 512).

The case of ship-money, 1637, 3 St. Tri. 825, rests on attempts to make inland counties pay an equivalent in money for the liability of the maritime counties.

Pepys in his Diary describes the procedure of his day (1666, June 30, July 1, July 2). In his view the giving of press-money was necessary to make the impressment legal. The right continued after the Revolution and into the present century, and while now dormant is by no means extinct, any more than the compulsory service in the militia, which can at any moment be imposed by proclamation.

The liability to impressment falls only on seafaring men and persons whose occupation and calling it is to work in boats or rivers (*R.* v. *Tubbs*, 1776, 2 Cowp. 512). Any waterman, bargeman, or lighterman may therefore be impressed, except a salt-water ferryman (*Ex parte Fox*, 1793, 5 T. R. 276; 2 R. R. 596; *Ex parte Young*, 1808, 9 East, 466). And the possession of freehold was no ground of exemption if the freeholder was a seafaring man (*R.* v. *Douglas*, 1804, 5 East, 477). It applies not merely to seamen in the strict sense, but to sea-going ships' carpenters, etc. (*Ex parte Boggin*, 1811, 13 East, 549; 12 R. R. 431).

Exemptions.—Except as to salt-water ferrymen, all the exemptions from the liability rested on statute. The following exemptions still exist:—

(1) Persons using the sea for two years from first going to sea (13 Geo. II. c. 17, s. 2).

(2) Persons bound apprentices to the sea service for three years from the binding (same Act; see *Softley's* case, 1801, 1 East, 466; 6 R. R. 329).

(3) Persons who have served in the Royal Navy for five years, while a proclamation calling for seafaring men is in force, are exempt for one year if discharged on their own application, and for two years if discharged by the Admiralty (5 & 6 Will. IV. c. 24, s. 2).

Protections.—The Admiralty on application must grant written protections to persons exempted by the Acts of 1739 (13 Geo. II. c. 17, s. 2) or 1835 (5 & 6 Will. IV. c. 24, s. 2), and may grant protection in other cases.

Procedure.—Impressment is effected under warrants issued by the Admiralty, after a proclamation or Order in Council for impressment has been issued (for form, see Prendergast, *Navy*, p. 121) to an officer of the navy. This officer, or his deputy, with the warrant and a press-gang, seize the seafaring men desired. In case of illegality, malice, or irregularity, resistance even to killing is justifiable (*R.* v. *Broadfoot*, 1743, Fost. *Cr. Law*, 154; *R.* v. *Webb*, 1788, 1 Black. H. 19; *R.* v. *Borthwick*, 1778, 1 Doug. 197; *R.* v. *Phillips*, 1778, 2 Cowp. 830).

A person impressed into the sea service without colour of legal authority is entitled to release by HABEAS CORPUS, not under the Act of 1679 (31 Chas. II. c. 2), but at common law, or under the Act of 1816 (56 Geo. III. c. 100) (Wilmot, *Opinions*, p. 105; *Goldswaine's* case, 1778, 2 Black. W. 1207; *Chalacombe's* case, 1810, 13 East, 550 *n*; 12 R. R. 431 *n*).

[*Authorities.*—Foster, *Crim. Law*, 164; Prendergast, *Navy*, 1852, pp. 78, 130.]

Impressment (Carriages, Animals, Vessels).—The obligation to provide carriages, animals, and drivers, upon the requisition of military officers, for moving regimental baggage, provisions of troops on the march and stores, or, in cases of emergency, for conveying the officers, soldiers, servants, women, and children, and other persons of and belonging to bodies of troops, is now regulated by the Army Act, 1881 (44 & 45 Vict. c. 58), Part III. Historically this subject is connected with the Crown's ancient prerogative of purveyance, which was abolished in 1660 (12 Chas. II. c. 24, s. 11), but which, as regards the army, was dealt with in subsequent statutes, and the Annual Mutiny Acts, which began to be passed at the Revolution. Closely related to this right of impressment is that of the exemption of officers and soldiers from tolls, which is dealt with in sec. 143 of the Army Act, 1881 (see ARMY). Provision for the conveyance of troops, etc., by railroad has also been made in various Railway Acts from the Railway Regulation Act, 1842 (5 & 6 Vict. c. 55, s. 20), down to the Cheap Trains Act, 1883 (46 & 47 Vict. c. 34), which extended their provisions to the reserve and auxiliary and naval forces, and to the officers and men of any police force. By sec. 16 of the Regulation of the Forces Act, 1871 (34 & 35 Vict. c. 86), when Her Majesty in Council declares that an emergency has arisen in which it is expedient for the public service that the Government should have control over railroads and tramways in the United Kingdom, the Secretary of State may by warrant empower any person to take possession of them, or of any plant, and to use the same for Her Majesty's service as directed; and the directors, officers, and servants shall obey the directions of the Secretary of State in regard thereto. Compensation for loss or injury sustained by the exercise of these powers is provided for. The National Defence Act, 1888 (51 & 52 Vict. c. 31), s. 4 (1), gives similar powers to the Government to secure precedence in the traffic of railways and tramways for naval and military purposes whenever the militia is embodied, and Her Majesty has signified, under the

hand of the Secretary of State, that such precedence is expedient for the public service.

The powers of the Army Act can only be exercised in obtaining animals and carriages, *i.e.* waggons, carts, or any vehicle of a kind suitable for carrying baggage, for the purpose of moving the regimental baggage and stores; unless a case of emergency is declared to exist, when a "requisition of emergency" may be issued in accordance with the provisions of sec. 115. Under sec. 31 it is penal, otherwise, to carry any person, except sick soldiers or servants. As in the case of billeting (*q.v.*), there must be a route issued to the commanding officer who, or an officer or non-commissioned officer authorised by him, must produce it to a justice of the peace having jurisdiction in any place mentioned in the route. The justice then issues his warrant requiring a constable to provide, within a reasonable time named, such carriages, animals, and drivers as are required. The constable then executes the warrant, and persons having the suitable articles must furnish them in a state fit for use. The number required from each is stated in the warrant, which also specifies the places from and to which they are to travel, and the distances between the places. Rates of payment and regulations are contained in the 3rd Schedule to the Act; and the Court of General or Quarter Sessions of a county or of a borough may increase such rates by not exceeding one-third (s. 113). The police authority for any place may cause annually a list to be made of persons liable to supply carriages and animals in certain numbers, and if any person is aggrieved by such list he may complain to a Court of summary jurisdiction, and the Court may amend the list (s. 114). Refusal or neglect to furnish what is required, giving or agreeing to give money or reward to any person to be excused from his obligation, or doing anything to hinder the execution of a warrant or order, is punishable summarily by a fine of not less than forty shillings, and not more than £10. Persons subject to military law committing offences in relation to the impressment of carriages and their attendants, are punishable by court-martial under sec. 31; and sec. 116 renders liable a constable neglecting or refusing to execute a warrant, or receiving or agreeing to receive, money or reward, for excusing or relieving any person entered in the list as liable to furnish, or from being required to furnish, or from furnishing any carriage, animal, or vessel, either in the ordinary case, or under sec. 115; or if he orders them to be furnished otherwise than as required by the Act to be furnished, is liable to a fine of not less than twenty shillings, nor more than £20. Certain supplemental provisions as to payment and personation whereby fraudulent demands may be made are contained in secs. 119–121. The provisions of the Act with regard to the impressment of carriages, etc., are applied by sec. 181 to the auxiliary forces when subject to military law.

[*Authorities.*—Stubbs, *Const. Hist.* ii. 283; Clode, *Military Forces*, i. 347; *Manual of Military Law*, War Office, 1894.]

Imprest.—1. "The king's money was sometimes issued by way of prest, or impress (*de praestito*), either out of the receipt of exchequer, the wardrobe, or some other of the king's treasuries. Imprest seems to have been of the nature of a *concreditum* or *accomodatum*. And when a man had money imprested to him he immediately became accountable to the Crown for the same" (1 Madox, *Hist. Exchequer*, 387). The practice is at least as old as the twelfth century (Madox, *l.c.* 387, 388), and has continued with modifications to the present day. An imprest roll was made up (25

Geo. III. c. 52, s. 22), and auditors of the imprest were appointed by letters patent to audit the credits; but the office was abolished in 1785 (21 Geo. III. c. 52, s. 1), on the report of the Commissioners of Public Accounts, on the ground that the audit was frivolous and nugatory, since it merely verified the arithmetical correctness of each account without any accurate examination as to the uses to which the specific credit was applied (Cobbett, *Parl. Deb.*, vol. xxv. pp. 298–307). The Act of 1785 provided for examination by the commissioners of audit of all persons who had received money by way of imprest (25 Geo. III. c. 85, s. 9). The issue and audit of credits from the public revenues is now regulated by the Exchequer and Audit Act, 1866 (29 & 30 Vict. c. 39), and the term "imprest" appears to have fallen out of use in the bill. It continues in some of the colonies (see the Imprest Supply Acts, 1896 (60 Vict. Nos. 1, 2, 4), of New Zealand).

2. The term is said also to be applied to money paid on enlisting soldiers (Jacob, *Law Dict.*, *s.v.*), and to press-money on impressing sailors (Wharton, *Law Dict.*, *s.v.*).

Imprimatur.—A licence to print a work. In this country such a licence was required when the censorship of the press existed. See LIBERTY OF THE PRESS.

Imprisonment.—A man is technically imprisoned (*in prisonâ*) when he is taken into custody or deprived of his freedom. He is not imprisoned by being prevented from passing in a particular direction, *e.g.* by obstruction of a highway; or by being forced to leave particular land, *e.g.* by ejectment as a trespasser. He must be to some extent the captive of his custodian or captor; but a man is imprisoned by being bound or chained in the open (3 Black. *Com.* 127; *Bird* v. *Jones*, 1845, 7 Q. B. 742).

Where the imprisonment is effected without lawful authority, the remedy is by action or indictment for FALSE *Imprisonment*, or by writ of HABEAS CORPUS.

PENAL SERVITUDE, the statutory substitute for transportation, technically involves imprisonment, but is distinct in its nature and incidents from common law imprisonment, or imprisonment as now understood with reference to sentences for crime.

The power to imprison was incidental to the criminal jurisdiction of the Crown, or the sheriff, or of the particular judicial franchises derived from the Crown, described in Scotland as heritable jurisdictions. It also existed in civil matters to a limited degree as a means of constraining or distraining the captive by his body to submit to a given jurisdiction, or to satisfy or secure a claim or judgment against him. Possibly it may be said that it was regarded as in the nature of process for CONTEMPT, which even now in many cases is treated as of a criminal character, and is made the basis or excuse for all that now remains of imprisonment for debt. The prerogative of the Crown to interfere with the liberty of the subject has been, and still is, limited by the following charters and statutes:—

1. *Nullus liber homo capiatur vel imprisonetur . . . nec super eum ibimus nec super eum mittemus nisi per legale judicium parium suorum vel per legem terræ* (Mag. Cart., ed. 1297, 25 Edw. I. c. 29).
2. No man from henceforth shall be attached by any accusation, nor forejudged of life or limb . . . against the form of the great charter and the law of the land (1331, 5 Edw. III. c. 9).

3. None shall be taken by petition or suggestion made to our lord the king, or to his council, unless it be by indictment or presentment of good and lawful people of the same neighbourhood where such deeds be done in due manner, or by process made by writ original at the common law (1351, 25 Edw. III. st. 5, c. 4).
4. No man of what estate or condition he be (including serfs as well as freemen) shall be . . . taken nor imprisoned . . . without being brought in answer by due process of the law (1354, 28 Edw. III. c. 3).

All these provisions of the great charter and its confirmations were further recognised and confirmed by the Petition of Right (1627, 3 Chas. I. c. 1), and by the Star Chamber Abolition Act (1640, 16 Chas. I. c. 10), and the Ship Money Act (1640, 16 Chas. I. c. 14, s. 2), and continue as one of the cardinal principles of English constitutional law, to which regard must be had wherever the express provisions of a statute cannot be vouched to warrant restraint of the liberty of any man. To these safeguards for liberty the Habeas Corpus Act, 1679 (31 Chas. II. c. 2, s. 11), added the penalties of PRAEMUNIRE for any illegal imprisonment of any inhabitant or resident of England in any place out of England.

Civil Matters.—The body of a defendant was taken by the writs of *capias, ad respondendum* on mesne process, or *ad satisfaciendum* in execution of a judgment.

(*a*) *Mesne Process.* — The only modes of civil imprisonment by mesne process are now—

(1) Extents and other like process against debtors to the Crown (see CROWN DEBTS; EXTENT; EXECUTION).

(2) The writ *ne exeat regno*, and the almost equivalent procedure under sec. 6 of the Debtors Act, 1869 (32 & 33 Vict. c. 62).

(3) Bankruptcy warrants (see BANKRUPTCY, vol. i. p. 497).

(4) ATTACHMENT (*q.v.*).

(*b*) *In Execution.*—The only cases in which imprisonment in execution of civil judgment is now permitted are—

(1) Where the judgment is mandatory or for an injunction, and is deliberately disobeyed (see CONTEMPT);

(2) In the case of an unsatisfied judgment for a penalty, whether recovered by penal action or information or otherwise, excluding penalties under contracts (32 & 33 Vict. c. 62, s. 4 (1));

(3) In the case of default by a person acting in a fiduciary character who is ordered to pay over money in his possession or under his control, or by a solicitor on paying costs ordered to be paid by him for misconduct, or in paying a sum of money ordered to be paid over by him as an officer of the High Court (32 & 33 Vict. c. 62, s. 4 (3) (4); 41 & 42 Vict. c. 54). These provisions are not abrogated by the Bankruptcy Act, 1883 (*In re Smith*, [1893] 2 Ch. 1);

(4) Default in payment over for the benefit of creditors by a bankrupt of salary or income under a bankruptcy order (32 & 33 Vict. c. 62, ss. 4, 5; 46 & 47 Vict. c. 52, s. 53);

(5) Default by a judgment debtor in paying the amount of the judgment when he has since the date of the judgment had means to pay (32 & 33 Vict. c. 62, ss. 4 (6), 5, 10; 46 & 47 Vict. c. 52, s. 103; see *Stonor* v. *Fowle*, 1888, 13 App. Cas. 20).

The limit of imprisonment under the exceptions is one year, and it is usual now to limit the order accordingly (32 & 33 Vict. c. 62, s. 4; *Brooke* v. *Edwards*, 1881, 21 Ch. D. 230). As to the treatment of civil prisoners, see PRISON.

The enforcement by imprisonment of the payment of penalties or sums

summarily recoverable as civil debts is regulated by the Summary Jurisdiction Acts (42 & 43 Vict. c. 49, s. 35), and is not within the Debtors Act, 1862 (32 & 33 Vict. c. 62, s. 4 (2); see *R.* v. *Pratt*, 1870, L. R. 5 Q. B. 176, and compare the Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90, ss. 6, 9, 14, 15), under which payment of civil debts by master or workmen and the obligations of apprentices can be enforced by imprisonment).

Crown Debts and Suits.—The provisions limiting imprisonment for debt do not apply to cases in which the Crown is claimant, *e.g.* for debt (see EXTENT) or for land; and in summary proceedings for taxes, imprisonment may be awarded in default of sufficient distress (Taxes Management Act, 1880 (43 & 44 Vict. c. 19, ss. 89–91)); and see EXCISE; STAMPS.

Criminal Matters.—Under the common law detention or imprisonment was not the appropriate or usual way of punishing treason or felony. Persons who had benefit of sanctuary had to abjure the realm; those who had BENEFIT OF CLERGY went free; while those who had neither, except in petty larceny, were put to death; and it is only in recent years and always under statute that imprisonment in the modern sense has been made a punishment for felony. But it appears to have been always available for the punishment of misdemeanours or trespasses or contempts against the peace of the sovereign, and, coupled with FINE and also with PILLORY, was the recognised punishment for such offences. The right to inflict it has never been restrained in general terms, and it is still the rule with respect to all statutory or common law misdemeanours, where the punishment is not prescribed by statute, that the defendant on conviction may be imprisoned for a period limited only by the discretion of the Court (see ARBITRARY PUNISHMENT, vol. i. p. 298). In the case of felony where a specific punishment is not awarded, sentence of imprisonment or penal servitude is awarded under 7 & 8 Geo. IV. c. 28, ss. 8, 9; 7 Will. IV. and 1 Vict. c. 90, s. 5; and 54 & 55 Vict. c. 69, s. 1.

"Hard labour" as an adjunct to imprisonment was unknown to the common law, and can never be legally imposed as a sentence without statutory authority; and any judgment illegally imposing it may be quashed on a writ of error (see ERROR, WRIT OF).

For authority to impose a sentence of imprisonment with hard labour it is necessary to refer to the enactment creating or prescribing the modern punishment of the offence. The only general enactments on the subject are—

(*a*) The Crown can commute a sentence of death to a sentence of imprisonment with or without hard labour (11 Geo. II. and 1 Will. IV. c. 39, s. 7).

(*b*) The Penal Servitude Act, 1891 (54 & 55 Vict. c. 69, s. 1 (1)), which empowers a Court to substitute for a sentence of penal servitude a sentence of imprisonment for not over two years with or without hard labour. This is distinct from the powers as to imprisonment reserved by 16 & 17 Vict. c. 99, s. 14, and 20 & 21 Vict. c. 3, s. 2.

(*c*) 3 Geo. IV. c. 114, and 14 & 15 Vict. c. 100, s. 29, which permit hard labour to be added to the common law sentence of imprisonment for—

Attempts to commit any felony;

Riot;

Wilful and corrupt perjury or subornation of perjury;

Rescue or escape from lawful custody on a criminal charge;

Common law cheats and frauds.

Conspiracies to cheat or defraud, or to extort money or goods, or falsely to accuse of any crime, or to obstruct, prevent, pervert, or defeat the course of public justice; keeping a common bawdy house or gambling house, or ill-governed and disorderly house; public and indecent exposure of the

person; public selling or exposing for public sale or public view any obscene book, print, picture, or other indecent exhibition.

The right to imprisonment on mesne process in criminal cases, *i.e.* for safe custody until trial, is treated under ARREST.

The treatment of prisoners in lock-ups or police cells is dealt with under LOCK-UP. Their treatment, whether convicted or unconvicted, when in a Crown prison, is dealt with under PRISON.

Most infractions of the statute or common law with respect to imprisonment constitute FALSE *Imprisonment* (*q.v.*).

Ecclesiastical Offences.—Ecclesiastical Courts can order imprisonment not exceeding six months for persons excommunicated, or against persons pronounced contumacious. The sentence is executed by writs *de contumace capiendo* or *de excommunicato capiendo* issued by the High Court on *significavit* under 53 Geo. III. c. 129 (see *Green* v. *Lord Penzance*, 1883, 6 App. Cas. 657).

Military and Naval Offences.—See ARMY and NAVY.

Lunatics.—See ASYLUMS.

Paupers.—See POOR LAW.

Privilege.—There is now no privilege from imprisonment on criminal process except in favour of persons clothed with diplomatic immunities (see DIPLOMATIC AGENTS); and no privilege from imprisonment on civil process except of members of Parliament during the sittings (10 Geo. III. c. 50, s. 2; 18 Geo. II. c. 34, s. 7), and of counsel, solicitor, suitor, and witness *eundo morando et redeundo* from or in any Court of justice (see *In re Freston*, 1883, 11 Q. B. D. 545; *In re Gent*, 1889, 40 Ch. D. 190).

Place of Imprisonment.—No imprisonment is lawful in any private place of custody. All the old franchise or manorial prisons are long since abolished, and from 1404 (5 Hen. IV. c. 10) it has been illegal to imprison except in the common gaol or house of correction (1743, 5 Geo. II. c. 5, s. 32). But custody outside the gaol is perfectly legal for so long as is necessary to enable the captors to convey the captive to a peace officer, or a judicial officer, or a place of public custody, such as a lock-up, police cell, or gaol. In all the changes of the law of prisons care has been taken to preserve for each judicial division of the country some building as the common gaol. On the abolition of county and borough or other local gaols or houses of correction in 1877 a series of Home Office Orders substituted the Crown prisons for the old places of imprisonment. They are for the most part collected in St. R. & O., Revised, vol. v. pp. 647–652. But BAIL (*q.v.*) remains as a relic of the old practice of intrusting offenders or debtors to private custody on receiving security for their submission to justice, or complying with any judgment, civil or criminal, pronounced against them. A man's bail have still in theory his custody; but this does not entitle them to imprison him in any private place, though they may seize him and surrender him to prison for their own discharge (*ante*, vol. i. p. 443).

Improper.—This word means "wrongful," that is, otherwise than by inevitable accident (per Brett, M. R., in *The Warkworth*, 1884, 53 L. J. P. D. & Ad. 66).

Impropriation—The granting of an ecclesiastical benefice to a layman or lay corporation. Strictly, the word is the counterterm of

appropriation, which denotes "the annexing of a benefice to the proper and perpetual use of some religious body politic," although in several statutes the two words have been used as synonymous (Phillimore, *Eccl. Law*, 2nd ed., 219–222).

Improvement Act District.—This was defined by sec. 4 of the Public Health Act, 1875, as "any area for the time being subject to the jurisdiction of any improvement commissioners" (see IMPROVEMENT COMMISSIONERS). By virtue of sec. 21 (1) of the Local Government Act, 1894, such a district is now called an urban district (see URBAN DISTRICT; LOCAL GOVERNMENT).

Improvement Commissioners.—As defined by sec. 4 of the Public Health Act, 1875, these were "commissioners, trustees, or other persons invested by any local Act with powers of town government and rating." They are now urban district councils (Local Government Act, 1894, s. 21 (1)), and election thereto is governed by the last-mentioned statute, except in the case of commissioners having powers and duties in respect of any harbours, in which case they continue to exist as a separate body as if that Act had not passed (Local Government Act, 1894, s. 65). See LOCAL GOVERNMENT; HARBOURS; URBAN DISTRICT COUNCIL.

Improvement of Land.—By a number of statutes passed during the present reign provision has been made for enabling improvements to be carried out on lands in the possession of tenants for life or other limited owners. Various Acts empowered the Treasury to make advances out of public money to such owners for drainage improvements; and by the Improvement of Land Act, 1864, great facilities have been granted to such landowners for effecting improvements of various kinds. Power is given to the Board of Agriculture to entertain, examine, and deal with applications for leave to borrow money under the powers of the Act for improvements, and if it should appear that the proposed improvements would effect a permanent increase of the yearly value of the lands, to sanction the same. The money borrowed is charged on the fee of the lands comprised in the sanctioning order, and made repayable with interest by half-yearly instalments extending over a fixed term of years. These instalments are payable by the tenant for life or other person having a limited interest in the land charged, who is also bound to uphold the improvements. Sec. 9 of the Act specifies the improvements which may be carried out; these include drainage, irrigation, embanking, inclosing of lands, making of roads, tramways, railways, canals, erection of cottages and other farm buildings, planting for shelter, construction of saw and other mills, and the construction of jetties, etc. To these, various other works have been added by sec. 25 of the Settled Land Act, 1882, which Act also enables a tenant for life, who is desirous of applying capital money arising under that Act in or towards payment for improvements, to submit a scheme for the execution of such improvements for the approval of the trustees of the settlement or of the Court; and provision is made for the expenditure of such money, on a certificate from the Board of Agriculture or an approved surveyor showing that the work has been executed, or on an order of Court. The tenant for life and his successors in title, who are protected from impeachment for

waste in respect of the execution and repair of the improvements, are bound to maintain the same, and insure buildings or other improvements which in their nature are insurable, during such period as the Board of Agriculture may prescribe. [For a full treatment of this subject, see title SETTLED LAND ACTS.]

Improvement of Towns.—By the Towns Improvement Clauses Act, 1847, one of a series of important consolidating Acts passed in the years 1845–47, certain provisions usually contained in Acts for paving, draining, cleansing, lighting, and improving towns were consolidated, and provision made for their incorporation in special Acts. The statute, besides dealing with drainage matters, empowers the local authority, where it has been made applicable, to provide for the numbering, naming, and improving of streets, to deal with ruinous or dangerous structures, to take precautions in the case of buildings in course of erection or repair, and enables them to license and control slaughter-houses. By secs. 160 and 169 of the Public Health Act, 1875, these various provisions, other than those relating to drainage, are incorporated into that Act. See PUBLIC HEALTH; TOWN GOVERNMENT.

Improvements, Compensation for.—See LANDLORD AND TENANT.

In accordance with the Form.—A bill of sale made or given by way of security for the payment of money is void, unless made "in accordance with the form" given in the schedule to the Bills of Sale Act, 1882 (s. 9). The meaning of the phrase "in accordance with the form" has been discussed in several cases. In *Ex parte Stanford, In re Barber*, 1886, 17 Q. B. D. 259, Bowen, L.J., delivering the judgment of the full Court of Appeal (Fry, L.J., dissenting on this point), said (p. 270): "A bill of sale is surely in accordance with the prescribed form if it is substantially in accordance with it, if it does not depart from the prescribed form in any material respect. But a divergence only becomes substantial or material when it is calculated to give the bill of sale a legal consequence or effect, either greater or smaller, than that which would attach to it if drawn in the form which has been sanctioned, or if it departs from the form in a manner calculated to mislead those whom it is the object of the statute to protect. . . . Whatever form the bill of sale takes, the form adopted by it, in order to be valid, must produce, not merely the like effect, but the same effect—that is to say, the legal effect, the whole legal effect, and nothing but the legal effect, which it would produce if cast in the exact mould of the schedule." In *Thomas* v. *Kelly*, 1888, 13 App. Cas. 506, Lord Fitzgerald agreed with the view of Bowen, L.J., in *Ex parte Stanford* (*ubi supra*), that it was sufficient if the bill of sale was substantially in accordance with, and did not depart from the statutory form in any material respect; but he refrained from expressing any opinion on the further remarks of Bowen, L.J., above quoted. Lord Macnaghten, in the same case, said: "It has been held, and I think rightly, that sec. 9 does not require a bill of sale to be a verbal and literal transcript of the statutory form. The words of the Act are, 'in accordance with the form,' not 'in the form.' . . . When is an instrument . . . not in accordance with the statutory form? Possibly when

it departs from the statutory form in anything which is not merely a matter of verbal difference. Certainly, I should say, when it departs from the statutory form in anything which is a characteristic of that form." See Weir, *Bills of Sale*, pp. 282 *et seq.*, and title BILLS OF SALE, vol. ii. p. 139.

In Addition.—Where a legacy given by a codicil is expressed to be "in addition" to one given by the testator to the same legatee in his will, the presumption is that the additional legacy is to be paid precisely in the same manner as the original; this construction, however, may be controlled by the context.

[*Authority.*—1 Jarman, *Wills*, 5th ed., 149.]

In Aid.—Where a testator, nearly the whole of whose real estate was mortgaged, devised a part of his real estate to his sons "charged nevertheless in aid of my personal estate and in exoneration of any other real estate with the payment of my just debts," and devised another part of his real estate to his daughter, it was held that there was no sufficient signification of a contrary intention under Locke King's Act to exonerate the mortgaged estate; both devisees therefore were held bound to contribute rateably to payment of the mortgage debt (*In re Newmarch, Newmarch* v. *Storr*, 1878, 9 Ch. D. 12).

Inauguration—The act of inaugurating or inducting a person into office with solemnity. The observance of Inauguration Day, or the anniversary of the sovereign's accession to the throne, as a day of public thanksgiving was enjoined on the Church of England by a canon of 1640 (see Bishop Sparrow's *Collection of Articles, etc., of the Church of England*, 4th ed., p. 349), and except during the reigns of Charles II. and William III. particular services have been observed in the Church on that day ever since (Phillimore, *Eccl. Law*, 2nd ed., p. 809).

In autre droit—In another's right, that is, in a representative capacity. An executor who sues for a debt due to his testator is said to sue *in autre droit*. When a person sues in a representative capacity the indorsement on the writ of summons must show this (R. S. C. Order 3, r. 4); it should also state, if the fact is so, that the defendant is sued in a representative capacity (*ibid.*).

In Blood.—Where the persons who were to take under the ultimate limitation of a settlement were the settlor's "next-of-kin in blood," it was held that the settlor's widow was excluded (*In re Fitzgerald*, 1889, 58 L. J. Ch. 662). In his judgment, North, J., said, "The result would have been the same if the words had been 'next-of-kin' simply; but the additional words 'in blood' make the case stronger against the widow."

In Camera.—See CAMERA, IN.

Incapacity.—Incapacity to contract, either wholly or in part, may arise from a variety of causes. These are summarised by Sir W. Anson (*Law of Contracts*, 8th ed., p. 106) thus: (1) Political or professional status; (2) infancy; (3) artificiality of construction, as in the case of corporations; (4) lunacy or drunkenness; and (5) coverture. See CONTRACT; STATUS; INFANTS; HUSBAND AND WIFE; LUNACY.

In criminal law children under the age of seven are considered incapable of committing crimes, and the acts of children between the ages of seven and fourteen which, if committed by adults, would be crimes, are deemed not to be such in their case unless the prosecution can affirmatively show that such persons knew that those acts were wrong. Incapacity in criminal law also arises in certain cases from insanity, coverture, compulsion, and necessity (see Stephen, *Digest of Crim. Law*, 5th ed., articles 25–33).

See also title DISQUALIFICATION.

In Cash.—It was decided in *Spargo's* case, 1873, L. R. 8 Ch. 407, that any *bonâ fide* transaction between a company and a shareholder which, if the company brought an action against him for calls, would support a plea of payment, is a payment "in cash" within sec. 25 of the Companies Act, 1867, which requires that shares shall be paid for in cash unless otherwise determined by a contract in writing filed with the Registrar of Joint-Stock Companies at or before the issue of such shares. *Spargo's* case (*ubi supra*) has been followed in a number of cases since (see these collected in Palmer, *Company Precedents*, Part II., 6th ed., p. 416), but in *Ooregum Gold Mining Co.* v. *Roper* in the House of Lords ([1892] App. Cas. 125), Lord Halsbury, L.C., said that he held himself free, if the question should ever come before the House, to consider the propriety of those decisions which allowed payment otherwise than in cash. See COMPANY.

Incendiarism.—See ARSON.

Incense.—The ceremonial use of incense was a custom of the primitive Church. Its use is not, however, specified in the Book of Common Prayer, and the use of it during or immediately before the celebration of the Holy Communion was held illegal in *Martin* v. *Mackonochie*, 1869, 5 Moo. P. C., N. S. 500, and *Sumner* v. *Wix*, 1870, L. R. 3 Ad. & Ec. (See also article COMMUNION, HOLY.)

These judgments, however, must be held, so far as the rule of finality is concerned, to depend upon the accuracy of historical investigation, and, as the matter may again be raised, it may be stated that there is clear evidence existing of the ceremonial use of incense in the Church of England at a time subsequent to the Reformation. Thus, to take one instance; in the churchwarden's accounts for St. Nicholas Church, Durham, in 1683, there is an entry "For frankincense at the Bishop's coming, 2s. 6d." There is also evidence of a ceremonial use of incense in the chapels of Bishop Andrews (1555–1626), and also of Bishop Sanderson, Bishop of Lincoln (1660–1663) (*b.* 1587; *d.* 1663), and a reference to the use of frankincense in a parish church by George Herbert, Rector of Bemiston (1630–1633) (*b.* 1593; *d.* 1633).

[*Authorities.*—Phillimore, *Eccl. Law*, 2nd ed.; Surtee, *History and Antiquities of the County Palatine of Durham*, vol. iv. p. 52; Prynne,

Canterbury's Doome, pp. 121-125; MS. of Bishop Sanderson in British Museum; George Herbert, *Country Parson.*]

Incest is sexual intercourse between persons who are within the prohibited degrees of affinity or consanguinity contained in the table prepared in 1563 and annexed to the Book of Common Prayer, and referred to in Canon 99 of 1603. These degrees include legitimate as well as illegitimate relations, and the half-blood as well as the whole blood (*Horner* v. *Horner*, 1799, 1 Hag. Con. 352; *Sherwood* v. *Ray*, 1837, 1 Moo. P. C. 355; *R.* v. *St. Giles*, 1847, 11 Q. B. 173; *R.* v. *Brighton*, 1861, 1 B. & S. 447; see AFFINITY).

In the law of Scotland incest is a high crime and offence under a Scots Act of 1567, c. 14, which defines it by reference to Leviticus c. xviii. It includes marriage with a deceased wife's sister, and was a capital offence till 1887 (50 & 51 Vict. c. 35, s. 56). As to the mode of enforcing the law, see Fraser on *Husband and Wife*, 2nd ed., 1520; Anderson, *Crim. Law of Scotland*, p. 92.

In England incest is not punishable by the civil Courts except under 53 Geo. III. c. 127, as auxiliary to the Ecclesiastical Courts, which alone have cognisance, but now very rarely exercise jurisdiction (see Canons of 1603, 109, 113; Steph. *Dig. Crim. Law*, 5th ed., p. 132; 2 Steph. *Hist. Crim. Law*, 396–429). The punishment is excommunication and penance (*Blackmore* v. *Brider*, 1816, 2 Phillim. 359). Where a statutory or common law offence against females involves incest, this circumstance operates in aggravation of sentence.

Incestuous marriages are now in all cases absolutely void and not voidable only (see 5 & 6 Will. IV. c. 54; *Andrews* v. *Ross*, 1888, 14 P. D. 15). But they are sufficiently marriages to support a prosecution for bigamy. See BIGAMY.

Incestuous adultery by a husband is *per se* a ground of divorce without the need of proving cruelty or other matrimonial offence (20 & 21 Vict. c. 85, s. 27). But accusing husband or wife of incest is not *per se* legal cruelty nor ground for judicial separation (*Russell* v. *Russell*, [1897] App. Cas. 395; at 453).

[*Authorities.*—Hammick on *Marriage*, 2nd ed., 30–42; Geary on *Marriage*, 30–32; Phillimore, *Eccl. Law*, 2nd ed.; Brown and Powles on *Divorce*, 6th ed., 220.]

In Charge.—Sec. 126, subsec. 2 of the Public Health Act, 1875, imposes a penalty upon anyone who being "in charge" of a person suffering from any dangerous infectious disorder exposes such sufferer in public places without taking proper precautions against the spread of the disorder. A medical man who merely walks by the side of a patient who is able to walk alone is not "in charge" of such person (*Tunbridge Wells Local Board* v. *Bisshop*, 1877, 2 C. P. D. 187).

Inch of Candle.—See AUCTION.

Incident—"A thing appertaining to or following another as a more worthy or principal" (*Co. Litt.* 151 *b*). Thus, a court baron is incident to a manor, rent to a reversion, and distress to rent.

Incidental.—Although on a sale by a tenant for life under the Settled Land Act, 1882, the costs of obtaining the concurrence of mortgagees to such sale are costs "incidental" to the exercise of the tenant for life's statutory powers within sec. 21, subsec. x. of the Act, yet where the mortgages have been granted by the tenant for life simply for his own purposes and his own benefit, such costs ought not to be allowed to be paid out of capital money produced by the sale (*Cardigan* v. *Curzon Howe*, 1889, 58 L. J. Ch. 436).

Services "incidental to the duty or business of a carrier" *primâ facie* include station accommodation, use of sidings, weighing, checking, clerkage, watching, and labelling, provided and performed by a railway company in respect of goods traffic conveyed by them as carriers (*Hall* v. *London, Brighton, and South Coast Rwy. Co.*, 1885, 15 Q. B. D. 505; *Sowerby* v. *Great Northern Rwy. Co.*, 1891, 60 L. J. Q. B. 467); but the taking of waggons from private sidings and attaching them to the trains, or returning same to such sidings, or allowing a consignor to leave goods on ground adjoining the railway line, do not fall within the category of such services (*Lancashire and Yorkshire Rwy. Co.* v. *Gidlow*, 1875, L. R. 7 H. L. 517). See also Stroud, *Jud. Dict.*

Incidental Expenses.—Where a judge's order directed a stay of proceedings on payment of debt and costs, with a stipulation that in default of payment the plaintiff should be at liberty to sign judgment, issue execution, and levy the debt and costs, together with the costs of execution, sheriff's poundage, officer's fees, "and all other incidental expenses," it was held that the sheriff was right in refusing to levy as "incidental expenses," the costs of a rule to return the writ (*Hutchinson* v. *Humbert*, 1841, 10 L. J. Ex. 418).

Incidental or Conducive.—The memorandum of association of a joint-stock company, after stating the main objects for which the company has been formed, usually empowers it to do all such other things as are "incidental or conducive" to these main objects or any of them. In several cases these words have been treated as material; for example, in *Simpson* v. *Westminster Palace Hotel Co.*, 1860, 8 H. L. 712, where the objects for which the company was established were stated to be "for the erection, furnishing, and maintenance of an hotel, the carrying on the usual business of an hotel and tavern therein, and the doing all such things as are incidental or otherwise conducive to the attainment of the above objects," it was held that the letting off, for a short period, of a large portion of the hotel to a Government department was *intra vires* the company, as being "incidental or otherwise conducive" to the attainment of the company's objects. See the whole of the cases on these words collected in Buckley, *Companies Acts*, 7th ed., p. 569 *n.* (*x*); see also Palmer, *Company Precedents*, 6th ed., Part I. p. 213.

Inclausa — An enclosure round a house (Kennet, *Paroch. Antiq.*, Glossary).

Inclosure Acts.—The inclosure of wastes and common lands has been the subject of legislation for many centuries,—the first statute

dealing with the question being passed so early as the year 1235. This was the Statute of Merton (20 Hen. III. c. 4), which, with the Statute of Westminster the Second (13 Edw. I. st. 1, c. 46), enabled lords to approve, that is, to inclose, waste lands, provided they left sufficient common of pasture for the freeholders. Under the power thus conferred much land was inclosed; in later times, however, when it was considered a national benefit to bring as much land as possible under cultivation, inclosures were chiefly effected by private Acts; of these, during the period between the Revolution and 1845, when public opinion began to change on the expediency of wholesale inclosures, it is said there were about four thousand, by which no less than over seven million acres of commons or common fields were inclosed (Shaw-Lefevre, *English Commons and Forests*, 20). A certain amount of inclosure was also brought about for plantations under a statute of 1756; and certain other inclosures were effected under an Act of 1773 relating to common fields.

Under the private Inclosure Acts commissioners were appointed in each case to carry out the inclosure, and as the clauses defining their duties and powers were practically identical in every case, these were consolidated into one general Act, the Inclosure Act, 1801, which, however, has now been superseded by the Inclosure Act, 1845, and the Acts amending same. By the Act of 1845 the Inclosure Commissioners (*q.v.*) were appointed to deal with all cases of inclosures; but these Commissioners have now been replaced by the Board of Agriculture (*q.v.*), without whose sanction, subsequently confirmed by Parliament, no inclosure of commons can now take place either under the modern statutes or under the Statutes of Merton and Westminster the Second (Commons Act, 1876; Law of Commons Amendment Act, 1893).

Lands subject to inclosure under the statutes are defined by sec. 11 of the Inclosure Act, 1845; these are "lands subject to any rights of common whatsoever, and whether such rights may be exercised or enjoyed at all times, or may be exercised or enjoyed only during limited times, seasons, or periods, or be subject to any suspension or restriction whatsoever in respect of the time of the enjoyment thereof; all gated and stinted pastures in which the property of the soil or of some part thereof is in the owners of the cattle gates or other gates or stints, or any of them; and also all gated and stinted pastures in which no part of the property of the soil is in the owners of the cattle gates or other gates or stints, or any of them; all land held, occupied, or used in common, either at all times or during any time or season, or periodically, and either for all purposes or for any limited purpose, and whether the separate parcels of the several owners of the soil shall or shall not be known by metes or bounds, or otherwise distinguishable; all land in which the property or right of or to the vesture or herbage, or any part thereof, during the whole or any part of the year, or the property or right of or to the wood or underwood growing and to grow thereon, is separated from the property of the soil; and all lot meadows, and other lands the occupation or enjoyment of the separate lots or parcels of which is subject to interchange among the respective owners in any known course of rotation or otherwise."

The initial procedure relative to the inclosure of such lands is now regulated by the Commons Act, 1876, by which the Board of Agriculture is empowered to entertain applications for a provisional order (1) for the regulation of a common, or (2) for the inclosure of a common, or (3) partly for the inclosure and partly for the regulation of a common. (The regulation, as distinguished from the inclosure, of commons is dealt with under the

titles COMMON and METROPOLITAN COMMONS; this article is further limited to the inclosure of commons other than those within the Metropolitan area; as to the inclosure of the latter, see METROPOLITAN INCLOSURE ACTS.)

Previously to making an application to the Board of Agriculture for a provisional order, persons wishing to inclose must give notice of their intended application by advertisement inserted in the newspaper or newspapers having the largest circulation in the neighbourhood of the common—two insertions in ordinary cases being sufficient; and also, in the case of a suburban common, that is, one within, or within six miles of, a town—a "town" being defined as a municipal corporation or urban district, having a population of not less than five thousand inhabitants—serve notice on such local authority (Act of 1876, s. 10; Board's *Regulations*, ss. 6 and 7). Applications, which can only be made by persons representing at least one-third in value of those proposed to be affected by the provisional order (Act of 1876, s. 2), must be in writing, and accompanied by a map defining the land proposed to be dealt with, copies of the newspapers in which the advertisement appeared, and proof of service, in the case of a suburban common, of notice on the local authority (*ibid.* s. 10; *Regulations*, s. 8). Evidence must also be furnished in support of the application considered in relation to the benefit of the neighbourhood as well as private interests (Act of 1876, s. 10); and if the Board is satisfied that a *primâ facie* case for inclosure has been made out, a local inquiry by an assistant commissioner will be ordered (*ibid.* ss. 10, 11). The assistant commissioner inspects the common in question, and, after due notice has been given, holds public meetings in the locality to hear all persons desirous of being heard, and otherwise obtains all such information as may enable him to report fully to the Board as to the expediency of granting the application (*ibid.*; *Regulations*, s. 12).

The Board may require, as a condition of allowing the inclosure to be effected, the appropriation of an allotment for recreation purposes, allotments for the labouring poor, the preservation of access to any particular points of view, the preservation of particular trees or objects of historical interest, and the setting out of roads, bridlepaths, or footpaths (Act of 1845, ss. 30, 31; Act of 1876, ss. 7, 34). If satisfied upon these points, and that it is otherwise expedient to proceed, the Board frames a draft provisional order, which, after notice of it has been duly given, will be certified, if it appears that at least two-thirds in value of those interested consent, or in the case of a common over which the freemen, burgesses, or inhabitant householders of any city, borough, or town are entitled to exercise rights, that two-thirds in number of such persons consent, or, where the common consists of the waste lands of a manor, that the lord of the manor consents. When certified, the provisional order is submitted to Parliament for confirmation (Act of 1876, s. 12).

When the provisional order has been confirmed, the Board convenes a meeting of the parties interested, for the purpose of appointing a valuer to carry out the inclosure, and to resolve upon instructions to him on any matters not inconsistent with the terms of the provisional order (Act of 1845, ss. 33, 34). The valuer then proceeds to hear the claims of the parties, and to divide, set out, and allot the land among those interested, according to their several interests, and also to set out those portions (if any) to be devoted to public purposes (for the management of which there are elaborate provisions), and generally to carry out the instructions given him at the meeting at which he was appointed. The costs of the inclosure are borne rateably by those interested. Encroachments on the common of

over twenty years' standing are to be deemed ancient inclosures (*ibid.* s. 52). Having determined all claims, the valuer draws up a schedule of those allowed by him, which is then deposited for public inspection; and if these allowances are not appealed against to the Board, or from the Board to the Courts, the valuer draws up his report. This is deposited for public inspection, after which the valuer makes his award, which, when confirmed by the Board, is conclusive evidence that the Act has been complied with (*ibid.* ss. 55, 102–105).

The several allotments, except those set apart for public purposes, have to be inclosed, ditched, and fenced as the valuer may direct (*ibid.* s. 83).

Town and village greens cannot be inclosed, but provision may be made for protecting their surface and fixing their boundaries (*ibid.* s. 15); encroachments on these greens are deemed public nuisances (Act of 1876, s. 29).

Partitions and exchanges of lands, and the division of intermixed lands, may also be effected under the Inclosure Acts.

[*Authority.*—See Elton, *Law of Copyholds*, 2nd ed., pp. 286–299, and App. I. and II., giving the *Regulations* of the Board of Agriculture; see also titles COMMON; METROPOLITAN INCLOSURE ACTS.]

Inclosure Commissioners—Certain persons appointed under the powers conferred by the Inclosure Act, 1845, to whom, in conjunction with the First Commissioner of Woods, was intrusted the duty of carrying the Inclosure Acts into execution. By the Settled Land Act, 1882, s. 48, these Commissioners were reconstituted as the Land Commissioners, who again were replaced by the Board of Agriculture (*q.v.*) under the Board of Agriculture Act, 1889.

Incognito (Dipl.).—A sovereign travelling *incognito*, though he enjoys as sovereign the right of exterritoriality (*q.v.*), is entitled to be treated as a private person, if he so wishes. But when he chooses to put an end to such *incognito*, he is entitled to all the prerogatives of a sovereign. Thus the King of Holland in 1873 was condemned by the police Court at Clarence in Switzerland to a fine, which was at once annulled on his making known his royal position (Rivier, *Droit Des Gens*, Paris, 1896, i. 418). In diplomacy a distinction is made between *simple* and *strict incognito*, the former being a diplomatic fiction used to dispense with ceremonial. In *Mighell* v. *The Sultan of Johore*, who was sued in England under the *incognito* of Albert Baker ([1894] 1 Q. B. 149), an order for substituted service was set aside and all proceedings stayed, on proof by the defendant that he exercised in his country "without question the usual attributes" of a sovereign ruler. It was contended that, inasmuch as a foreign sovereign may submit to the jurisdiction of the Courts of this country, and the Sultan of Johore had taken an assumed name and acted as a private individual, he had submitted to the jurisdiction, and could not claim his prerogative as a sovereign. "I am of opinion," said Lopes, L.J., "that no such inference can be drawn. In my judgment the only mode in which a sovereign can submit to the jurisdiction is by a submission in the face of the Court, as, for example, by appearance to a writ. That he intends to waive his rights by taking an assumed name cannot be inferred."

Income.—See CORPUS AND INCOME; INCOME TAX.

Income Tax.

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PRELIMINARY.—After numerous attempts by the Crown and Parliament to devise a system of taxation which would reach personal property, and prevent evasion or untrue returns, Pitt in 1799 established the income tax (39 Geo. III. cc. 13, 22). In 1803, Addington introduced modifications into Pitt's scheme (43 Geo. III. c. 122), and in 1806 (45 Geo. III. c. 65) further modifications were made. The tax was dropped in 1816, but was revived in 1842 by Peel, by the Act on which it is now mainly based (5 & 6 Vict. c. 35), which is a re-enactment of the Act of 1806, with certain additions and alterations. The history of these experiments on taxation up to 1842 is treated in Dowell on *Income Tax Laws*, 4th ed., pp. i.–xlii. The whole of the law on the subject of the tax is purely statutory, and depends (1) upon the construction of the statutes; (2) upon their application as construed, to the persons or property sought to be charged, exempted, or relieved. The rule of construction (which is not a rule of law, but a presumption only) applicable to taxing Acts, is said to be that the letter and not the spirit of the statute is to be followed. Unless Parliament has by express words or obvious intention, ascertained by examining the whole of the statute, laid a tax on an individual, no extraneous considerations of policy or equity will justify the Courts in bringing such individual within the net of the revenue (*Coltness Iron Co.* v. *Black*, 1883, 6 App. Cas. 315; *Commissioners for Special Purposes of Income Tax* v. *Pemsel*, [1891] App. Cas. 531; Maxwell on *Statutes*, 3rd ed., 168, 401; Hardcastle on *Statutes*, 2nd ed., 442, 523–525).

The Income Tax Acts, while applicable since 1853 (16 & 17 Vict. c. 34) to the whole of the United Kingdom, are framed in the main in the language of English lawyers, without always inserting the equivalent terms of Scotch or Irish law. This fact, undoubtedly, may cause difficulty of application; but all serious doubts have thus far been resolved by the action of the House of Lords as the *commune forum* of all three countries, and the incidence of taxation under the Acts has been thereby equalised. The effect of the statutes in England is here alone considered, without regard to the particular modifications of the taxation affecting only Scotland or Ireland.

The scheme of taxation has been to provide (1) by the Acts of 1842 (c. 35) and 1853 (c. 34), a code of directions as to the mode of assessing and levying the tax when granted; (2) by an annual Act, the rate at which the tax is to be levied for the current financial year. These annual Acts frequently also contain amendments of the code, altering the incidence or exemptions or the mode of levy. The effect of this mode of legislation has been said by Lord Macnaghten in *Income Tax Commissioners* v. *Pemsel*, [1891] App. Cas. 532, 591, to make the income tax code annual, and to override exemptions in any local Act of earlier date than the annual charging Act, and the Acts themselves are distinctly unfavourable to any theory of local immunities.

NATURE.—The tax is an equal "pound tax" of so much on every pound of taxable income from property, real and personal, professions, trades, and offices. The scale of taxation does not, as in the case of the new estate duty, ascend with the wealth of the person taxed.

The amount of the tax for any given year is settled annually by a charging Act; that now in force is the Finance Act, 1897 (60 & 61 Vict. c. 24, s. 4). The year of charge is from April 6 to the next April 5 (5 & 6 Vict. c. 35, s. 176; 43 & 44 Vict. c. 19, s. 48).

The tax is payable on or before January 1 in the year of charge (1880, c. 19, s. 82), except in the following cases:—

(*a*) Railways, which pay the tax under Schedule D, by four quarterly payments, beginning on June 20 (1880, c. 19, s. 95).

(*b*) Tax payable by way of deduction (1842, c. 35, s. 158).

Default in payment of income tax makes the taxpayer a Crown debtor. Payment may be enforced by distress, or by detention of a defaulting taxpayer in prison by warrant of the general commissioners (1880, c. 19, ss. 82–91).

INCIDENCE.—The taxation ultimately falls on the beneficial interest in the taxable subject, whether vested in a natural or legal person; but special rules are made as to the mode of charge and collection in the case of corporations, societies, persons under disability, persons abroad, trust property, property in Court (1842, c. 35, ss. 40–54, 173; 1878, c. 21, s. 18), and as to deduction of tax from interest payable under contract or will or out of profits of trade. In the case of decease, the executors must pay the accrued tax (1842, c. 35, s. 173; 53 & 54 Vict. c. 8, s. 24).

TAXABLE SUBJECT.—The subject of the tax is (1) all income derived from whatever source in the United Kingdom, whether by residents or absentees, subjects or aliens; (2) all income derived from sources outside the United Kingdom, and received in the United Kingdom by subjects or aliens resident therein (1842, c. 35, ss. 88, 104 (iv.); 1853, c. 34, ss. 2, 5, 6; *Colquhoun* v. *Brooks*, 1889, 14 App. Cas. 493; *Forbes* v. *Scottish Provident Institution*, 1896, 23 Rettie, 323). Residence means not "domicile," but an established place of abode (*Rogers* v. *Inland Revenue*, 1879, 1 Tax Cas. 225; *Lloyd* v. *Sulley*, 1884, 2 Tax Cas. 37).

A company which is formed under English law, and has a registered office in the United Kingdom, and carries on business partly there, is treated as resident there (*San Paulo Brazilian Rwy. Co.* v. *Carter*, [1896] App. Cas. 31). A foreign company or person carrying on business in England, but not domiciled or resident there, is chargeable only on the profits made on business done there (*Grainger* v. *Gough*, [1896] App. Cas. 325). What amounts to carrying on business is difficult to say, having regard to the cases there discussed and *Watson* v. *Sandie*, 1897, 14 T. L. R. 124. But foreign investments of an English company are treated as part of its trading assets if remitted to England (*Norwich Union Fire Assurance Co.* v. *Magee*, 1896, 44 W. R. 384).

Temporary absence by a person ordinarily resident in the United Kingdom does not exempt from duty; nor does presence in England for temporary purposes for not over six months create a liability to the tax (1842, c. 35, s. 39).

Where persons abroad receive income from England through trustees, guardians, agents, and the like, it is taxable (1842, s. 41), and the tax must be deducted by the trustee, agent, etc.

CLASSIFICATION OF INCOME.—The sources of income are classified under five heads, by what are called the schedules of charge in the Act of 1842

which are framed with regard to consideration of the most effectual way of assessing the particular income so as to prevent error or deceit.

They may be summarised thus:

Income or profits derived from ownership or occupation of land—Schedules A, B.

Income derived from investments in public funds—Schedule C.

Income derived from public office—Schedule E.

Income derived from professions, trades, or callings—Schedule D.

The provisions of the Act specifically applied to duties in a particular schedule are, where not repugnant to the specific provisions applied to duties under other schedules, to be also applied to them (see *Tennant* v. *Smith*, [1892] App. Cas. 150, 160).

SCHEDULE A.—*Land.*—Lands, tenements, and hereditaments or heritages in respect of the ownership thereof on the annual value thereof (1853, c. 34, s. 2).

For the purpose of this schedule outside London the value is taken to be the same for 1897–98 as for 1896–97 (60 & 61 Vict. c. 24, s. 4), and is assessed by the surveyors of taxes (1896, c. 28, s. 30). In the metropolis, it is as fixed by the valuation list of 1896, and the supplemental lists under 32 & 33 Vict. c. 67.

The rules for assessment are contained in secs. 60, 61 of the Act of 1842.

I. The general rule is to assess the lands at their rack rent, if fixed within seven years before the assessment, or if not at the rack rent which it is estimated they would fetch (s. 60 (i.), s. 63 (x.), s. 64 (xi.), ss. 65, 66, 67, 68, 70).

II. "Hereditaments" include easements, *profits à prendre in alieno solo*, such as sporting rights, or rights to cut timber or saleable underwood on land not in occupation of the owner, tithes in kind (three years' average), ecclesiastical tithes and dues (three years' average), and compounded tithes, but not tithe rent-charge (one year's profits), manors (with their dues, services, and casual profits), and fines on leases or renewals (one year's profits). In the case of fines, the general commissioners may discharge the assessment if the fines have been applied as "productive capital" on which profit has arisen (*Mostyn* v. *London*, [1895] 1 Q. B. 170). In the case of manors, the return is made on an average of seven years of the dues, etc. (*Norfolk* (*Duke*) v. *Lamarque*, 1890, 24 Q. B. D. 485). The general rule of assessment does not apply to these hereditaments (other than *profits à prendre*), and they are assessed in accordance with the regulations of s. 60, No. ii.

Industrial concerns arising out of land are assessed on the profits received from the going concern.

(*a*) Quarries of stone, limestone, slate, or chalk, on those of the preceding year, whether the working is by open cast or underground (*Jones* v. *Cwmorthen Slate Co.*, 1879, 5 Ex. D. 93).

(*b*) Mines of coal, tin, lead, copper, etc., *ejusdem generis*, on an average of the five preceding years, subject to abatement if the value is decreasing from unavoidable causes (1842, s. 60, iii. (2) iv. (5)), and with a diminution for wear and tear of machinery and plant which are included in the mine for valuation (1878, c. 15, s. 12). The ruling decisions on the mode of assessment are, *Coltness Iron Co.* v. *Black*, 1888, 6 App. Cas. 315, and *Broughton Coal Co.* v. *Kirkpatrick*, 1884, 14 Q. B. D. 491; and as to cost book mines, *Morant* v. *Wheal Grenville Mining Co.*, 1894, 3 Tax Cas. 298.

The duty on alum works, gas works, iron works, salt works, water works, canals, docks, drains and levels, inland navigations, railways, rights of market,

fair, or toll, and like concerns, is charged on the persons carrying on the concern, or their managing officers or agents, and is assessed on the profits of the year preceding (1842, s. 60 (iii.)), without deduction for "improvements" and exclusive of the lands used in or about the concern (*Highland Rwy. Co.* v. *Balderston*, 1889, 2 Tax Cas. 485). It is immaterial whether the works are in the hands of commercial or municipal owners (*In re Glasgow Corporation*, 1876, 1 Tax Cas. 122; *Dillon* v. *Haverfordwest* (*Mayor, etc.*), [1891] 1 Q. B. 875); though in the latter case there are means of making no profit (see *Glasgow Corporation* v. *Inland Revenue*, 1875, 1 Tax Cas. 28; *Miller* v. *Glasgow Corporation*, 1886, 2 Tax Cas. 131).

The expression "toll" includes coal duties (*A.-G.* v. *Black*, 1871, L. R. 6 Ex. 308) and harbour tolls (*Sowrey* v. *King's Lynn Harbour, etc.*, 1887, 2 Tax Cas. 201; *Hall* v. *Same*, 1875, 1 Tax Cas. 23). Burial boards and cemetery companies are assessed under this head if they make a profit (*Portobello Town Council* v. *Sulley*, 1890, 2 Tax Cas. 647).

As a general rule, property, etc., under Schedule A is charged in the parish where it is situate. But manorial dues are charged where the manorial Court is held, and fines where the recipient resides; while railways, etc., are charged where the general accounts are made up (1842, c. 35, s. 60 (iv.); 1880, c. 19, s. 53), and mines where they are situate or where their produce is manufactured (1842, s. 60 (iv.) (5)).

Where the owner has not been in for the full year, the estimate of the profits is made on the receipts for the period of ownership (s. 60 (iv.) (6)).

The person usually charged is the occupier, subject to right of deduction from the rent payable to the owner (ss. 60 (iv.) (9), 63). The owner cannot shift his liability on to the tenant (s. 73).

But in the cases of houses under £10 value, or occupied by accredited ministers of a foreign State, the owner is charged (s. 60 (iv.) (3) (7)), and in the case of official residences belonging to the Crown except in a royal palace, the occupier is charged and pays as owner (s. 60 (iv.) (8)) (*Coomber* v. *Berks Justices*, 1884, 9 App. Cas. 61). Under the Finance Act, 1894, c. 30, s. 35, deductions are made on the assessment of lands in cases in which the annual value is estimated otherwise than by relation to profits, in certain cases there set out in detail.

SCHEDULE B provides for assessing lands, tenements, and hereditaments in respect of the occupation thereof on the annual value thereof. The schedule extends to the same subjects as Sched. A, except dwelling-houses and their domestic offices (other than farmhouses occupied under one demise with farm lands for farming), and warehouses or buildings occupied for trade or profession (s. 63 (vii.)).

It deals mainly with occupation of farms and farmhouses let therewith for agricultural purposes, but it applies also to the occupation of deer forests or shootings (*Middleton* v. *Lord Advocate*, 1876, 3 Rettie, 599; *Revell* v. *Scott*, 1895, 23 Rettie, 772). Farmers can elect to be assessed under Sched. D (1887, c. 15, s. 18).

Outside London the assessment for 1897–98 is the same as for 1896–97 (60 & 61 Vict. c. 24, s. 4), and the tax is charged only on one-third of the annual value or on less if the year's profits are shown to be less (1896, c. 28, ss. 27, 28, 30; 1897, c. 24, s. 4). This change assimilates the tax in England to what it had always been in Scotland.

The one-eighth deduction prescribed by the Act of 1842 (c. 35, s. 63 (vii.)) was abolished in 1896 (c. 28, s. 26 (2)).

The system of assessment is the same under Sched. B as under Sched. A, except as to market gardens or nurseries, which are assessed under

Sched. D (1842, c. 35, s. 63 (viii.)). Hop grounds were so assessed, but are now dealt with like other agricultural land (1853, c. 34, s. 39). This system makes the basis of charge the rent or annual value; but persons occupying lands for husbandry only, whose profits are less than one-third of the annual value, are entitled to abatement (1851, c. 12, s. 3; 1853, c. 34, s. 46; 1880, c. 20, s. 52; 1890, c. 8, s. 23; 1896, c. 28, ss. 27, 28).

Deductions on Account of Duties.—A deduction is allowed of one-third of a rent-charge under a drainage loan granted out of public money under statutory authority (1853, s. 42).

Occupiers of lands must pay the income tax under Sched. A, and deduct from the next payment of rent the part thereof attributable to the owner (1842, s. 60 (iv.) (9); 1853, s. 40). If they do not so deduct, they cannot recover it back (*Cumming* v. *Bedborough*, 1844, 15 Mee. & W. 438). It is immaterial whether the landlord is assessed or not (*Swatman* v. *Ambler*, 1855, 24 L. J. Ex. 185). The deduction is at the rates running while the rent, etc., was accruing (1864, c. 30, s. 15). Owners of land must deduct the tax assessed on tithe rent-charges, quit rents, and other annual payments reserved and charged on the land (1842, c. 35, s. 60 (iv.) (10); 1853, c. 34, s. 40), before paying them over.

No contract can be legally made transferring the liability of a person subject to tax under Schedules A and B (1842, c. 35, s. 73).

SCHEDULE C.—*Public Funds.*—The tax is levied upon the annual value of all profits arising from annuities, dividends, and shares of annuities payable to any person, body politic or corporate, company or society, whether corporate or not corporate, out of any public revenue (1842, c. 35, s. 88; 1853, c. 34, s. 2), whether of the United Kingdom or any colony or dependency or of any foreign State. This includes the interest on Exchequer bills or Treasury bills, and securities issued at any public office, and East India bonds (1842, c. 35, s. 97; 1854, c. 24, s. 3), and coupons annexed to stock certificates (1870, c. 71, s. 36). Where the stock is inscribed at the Bank of England or Ireland, the bank deduct tax before paying dividend or interest. Where the annuities, etc., are payable at the Bank of England or of Ireland, they are assessed and charged by the governors of such bank (1842, c. 35, s. 24; 1853, c. 34, s. 11). This is extended to India stock (26 & 27 Vict. c. 73, s. 10). Interest payable out of the public revenue on securities issued at the Treasury (Exchequer) or other public office, or on East India bonds, is assessed under the schedule by the commissioners appointed under Sched. E. Annuities, etc., out of colonial or foreign revenues are assessed and charged by the commissioners for special purposes (1842, c. 35, ss. 24, 96), to whom all persons intrusted with payment by, or acting on behalf of, the colony or foreign State (except the Bank of England) must on notice from the Inland Revenue send in a written account of all such annuities intrusted to them (1842, c. 35, s. 96; 1842, c. 80, s. 2). The term "person intrusted" includes bankers or others who sell or realise or present for others coupons, dividend warrants, or bills of exchange for dividends, and dealers in coupons (1885, c. 51, s. 26; 1888, c. 51, s. 24 (2)). If they do all the necessary acts to facilitate assessment, such persons receive an allowance not less than threepence in the £ assessed by the Treasury.

SCHEDULE D.—*Trades, Professions, etc.*—This schedule contains six distinct classes or cases.

I. Trades, manufactures, adventures, or concerns in the nature of trade not assessed under Sched. B.

This includes the business of a burial board or harbour authority

carrying on its business at a profit, whatever the destination of the profits (*Mersey Docks, etc.* v. *Lucas*, 1883, 8 App. Cas. 891), and also mutual or religious societies carrying on business at a profit (*New York Life Assurance Co.* v. *Styles*, 1889, 14 App. Cas. 381; *Religious Tract, etc., Society of Scotland* v. *Forbes*, 1896, 23 Rettie, 390). A company which exists to speculate in stocks, etc., is a trade within this case (*Scottish Investment Trust Co.* v. *Surveyor of Taxes*, 1893, 21 Rettie, 202). But buying up doubtful debts with the result of making a profit is not making a profit within the Act unless done as a regular business (*Assets Co.* v. *Inland Revenue*, 1897, 24 Rettie, 578).

The assessment is made on a three years' average of the balance of profits, *i.e.* the net profits, arrived at by setting the receipts against the expenditure necessary to earn them (*Gresham Life Assurance Co.* v. *Styles*, [1892] App. Cas. 309). The chief difficulty has arisen in valuing the profits of insurance companies, both because of the nature of the business and the skill of their actuaries in confronting the assessors (see Dowell, p. 126 *n.*). Abatements are allowed for depreciation of machinery or plant (1878, c. 15, s. 12; *Burnley S.S. Co.* v. *Aiken*, 1894, 21 Rettie, 965).

II. Professions, employments, or vocations not dealt with in Schedules B or E, but including all regular means of making a livelihood which are not illegal (*Partridge* v. *Mallandaine*, 1886, 18 Q. B. D. 276), and whether the employment is on retainer or not (1842, s. 100, case 2, r. 1).

The assessment is made on a three years' average of the net profits (1853, c. 34, s. 48), and subject to the deduction of life insurance premiums (1853, c. 34, s. 54).

Deductions are not allowed in assessing the profits of trades or professions in the following cases:—

(*a*) For repairs of trade premises or implements in excess of the three years' average expenditure. The repairs of tied houses cannot be deducted in estimating the brewers' profits (*Brickwood* v. *Reynolds*, [1898] 1 Q. B. 95 C. A.).

(*b*) For loss unconnected with the trade.

(*c*) For withdrawal of capital or capital invested. This does not include money advanced by brewers' bankers (*Reid's Brewery* v. *Male*, [1891] 2 Q. B. 1), but does include the price of buying the business (*London Contract Corporation* v. *Styles*, 1887, 4 T. L. R. 51).

(*d*) For capital spent on improvements, or on account of interest which such capital would have brought if invested.

(*e*) For any debts except bad debts, nor for average losses beyond the actual amount after adjustment (1853, c. 34, s. 50), nor for them if insured against (see *f*).

(*f*) For sums recoverable on contracts of insurance or indemnity (*Rhymney Iron Co.* v. *Fowler*, [1896] 2 Q. B. 79).

(*g*) For annual interest on annuities or other annual payments, which are either directly charged on the net profits, or are of such a nature as to form a proper charge thereon (*Gresham Life Assurance Co.* v. *Styles*, [1892] App. Cas. 309).

(*h*) Disbursements, etc., not wholly for the purpose of the trade (*Dillon* v. *Haverfordwest (Mayor)*, [1891] 1 Q. B. 575; *Watson* v. *Royal Insurance Co.*, [1897] App. Cas. 1).

(*i*) Disbursements for maintenance of family or establishment, or any other domestic or private purpose.

(*j*) The rent or value of a dwelling-house, except the proportion referable to such part as is used for the trade, etc., not exceeding two-thirds

(s. 100, case 2, r. 1; and see *Russell* v. *Town and County Bank*, 1888, 13 App. Cas. 418; *Tennant* v. *Smith*, [1892] App. Cas. 150).

(*k*) The profits of lands occupied for the purpose of the trade, etc. (s. 100, case 2, r. 2).

III. Profits of an uncertain annual value not included in Sched. A, including small dividends under 50s. (s. 95), and profits on securities bearing interest not being annual out of the public revenue not assessed under Sched. C. Where lands occupied by a cattle dealer or milkseller do not afford an accurate index of his profits, a return of profits may be required (s. 100, case 3, r. 3).

The assessment is on the full annual amount of profits without deduction.

IV. Interest on securities in British colonies or possessions or foreign States not charged under Sched. C.

The assessment is on the full amount received, or to be brought into account as interest and treated as profit in the United Kingdom in the year of charge without deduction or abatement (s. 100, case 4). Investments of a mortgage company in foreign securities fall within this case (*Scottish Mortgage Co.* v. *McKelvie*, 1886, 2 Tax Cas. 165), but not mere temporary advances like bankers' loans (*Smiles* v. *Australasian Mortgage Co.*, 1888, 2 Tax Cas. 367). Interest from colonial investments reinvested abroad is not within this case (*Forbes* v. *Scottish Provident Institution*, 1895, 23 Rettie, 323).

V. Income from possessions in British dominions outside the United Kingdom and in foreign States (s. 100, case 5).

Under this head are assessed the interests of persons or companies resident in the United Kingdom in any foreign property falling under case iv. or Sched. C, so far as the income thereof is transmitted to or received in account in the United Kingdom (*Colquhoun* v. *Brooks*, 1889, 14 App. Cas. 493; *Bartholomay Brewing Co.* v. *Wyatt*, [1893] 2 Q. B. 499; *Nobel Dynamite Trust Co.* v. *Same*, [1893] 2 Q. B. 508; *Aiken* v. *Macdonald's Trustees*, 1894, 22 Rettie, 88). The assessment is on the sums actually received in the United Kingdom. The case does not apply to trades carried on partly in the United Kingdom, partly abroad, by a company resident in the United Kingdom (*San Paulo Brazilian Rwy. Co.* v. *Carter*, [1896] App. Cas. 31), which are assessed under case i.

VI. Annual profits or gains not hit by any of the previous cases of Sched. D or any of the other four schedules. There is no reported decision to which this case has been clearly held to apply (Dowell, 142).

VII. Sec. 102 of the Act of 1842 in substance, though not in form, merely deals with duties imposed under the five schedules (*Forbes* v. *Scottish Provident Institution*, 1895, 23 Rettie, 323).

The tax falls upon interest or any annual payment (1) charged on profits of a trade or business, (2) charged on property of the payor by deed or will or reservation on grant, or (3) as a personal debt or obligation under contract. If the profits or property or persons liable are in the United Kingdom, it is immaterial where the recipient of the interest is. The payor is entitled to deduct the income tax on payment of the interest (A) in all cases where it is forbidden to deduct it on assessment of the profits or gains of the payor; and (B) where the interest is paid by or through him, whether as a personal debt of his own or not (1853, c. 34, s. 40; 1888, c. 8, s. 24). In this case no assessment is made, and the deductor is a person accountable to the Crown for the amount deducted (*Lord Advocate* v. *Forth Bridge Rwy. Co.*, 1890, 3 Tax Cas. 1).

Refusal to allow deductions entails forfeitures and penalties, and it is not permissible to contract out of liability for deduction (s. 103).

Secrecy.—Persons concerned in assessment under Sched. D are bound by declaration of secrecy not to disclose any information given them for the purposes of the assessment, or any returns made by the taxpayer. The same rule applies as to returns under Sched. A in respect of concerns in the nature of manufactures. The rule rests not merely on the power of departments of State to refuse to disclose official documents, but also on the Act of 1842, sec. 38, and on sec. 22 of the Revenue Act, 1863 (26 & 27 Vict. c. 33) (Dowell, p. lxx.).

SCHEDULE E.—*Public Employment.*—Upon the annual amount of every public office or employment of profit, and of every annuity, pension, or stipend payable by the Queen or out of the public revenue, except those charged under Sched. C (1853, s. 2). This schedule includes the salaries, etc., of officers in public departments of State and municipal corporations and railway companies (1860, c. 14, s. 5), or public trading companies or other corporations (*Tennant* v. *Smith*, [1892] App. Cas. 150), and such persons as the bursar of a college (*Langston* v. *Glasson*, [1891] 1 Q. B. 567), or a national schoolmaster (*Bowers* v. *Harding*, [1891] 1 Q. B. 560).

The assessment is made on all salaries, fees, wages, and perquisites or profits. These do not include a residence *virtute officii* (see Sched. B) (*M'Dougal* v. *Sutherland*, 1894, 21 Rettie, 753), except where the occupant can let it (*Cooke* v. *Fry*, 1895, 22 Rettie, 422); nor voluntary gifts by congregation to a minister (*Inland Revenue* v. *Strang*, 1878, 1 Tax Cas. 704), or by a clergy benevolent society (*Turner* v. *Cuxon*, 1888, 22 Q. B. D. 150).

The rules for charging the duty are contained in secs. 146, 147, 149, 150–157 of the Act of 1842.

The special commissioners deal with the salaries of railway officials, and the company deducts tax before paying salary (1860, c. 14, s. 6).

A deduction is allowed for expenses, including travelling expenses *necessarily* incurred in the performance of official duties (1853, c. 34, s. 51). For the limits of this deduction, see *Revell* v. *Elworthy Bros. Ltd.*, 1890, 3 Tax Cas. 12; *Bowers* v. *Harding*, [1891] 1 Q. B. 560.

If the salary is raised during the year of charge a supplemental assessment is made (1853, c. 34, s. 35).

DEDUCTIONS, ALLOWANCES, AND ABATEMENTS.—Four words are used in the Acts with reference to the difference between gross and assessable annual receipts and profits, namely, abatements, allowances, deductions, and exemptions. Deduction is used also in another sense with reference to the duty of persons paying over taxable income to others. It is difficult to say that any substantial distinction underlies this variety of expression. But by exemption appears to be meant freedom of profits from assessment, and by the other terms, discounts to be made to settle the difference between gross and net profits, so as to arrive at the taxable value of the subject; and in some cases abatement is used with reference to matters arising after assessment which give a claim for relief. Most of the deductions and abatements have been stated in describing the schedules. But it remains to call attention to the following abatements. Where the stock or crops of tenants occupying land at a reserved rent are injured or the land is rendered uncultivable, owner and tenant are entitled, on proof of the loss, and of consequent abatement of rent, to have their assessments under Schedules A and B proportionably abated (1842, c. 35, ss. 83, 84, 85, 86).

Where profits or gains turn out at the end of the year of charge to be

less than the taxpayer's computation on the assessment, on proof of the fact he is entitled, if he proceeds with due diligence, to a certificate from the special commissioners for the amendment of his assessment, and the repayment of any tax overpaid, if his profits are shown to be less than the profits of one year on the average of the last three years (1842, c. 35, s. 133; 1865, c. 30, s. 6; *R.* v. *Special Income Tax Commissioners*, 1888, 21 Q. B. D. 313).

If the profession or trade is given up within the year of charge, or the taxpayer dies or becomes bankrupt, the general purposes commissioners, on application within three months of the end of the year, may amend the assessment and direct repayment of any tax overpaid (1842, s. 134). And ministers of religion under whatever schedule they are assessed, in respect of the profits, fees, or emoluments of their profession or vocation, are entitled to deduct money paid or expense incurred necessarily in the personal performance of their duties (*Lothian* v. *Macrae*, 1884, 2 Tax Cas. 65).

Insurance Premiums. — Premiums of insurance on life or deferred annuities are deducted in computing income under Schedules D and E if the insurance is made on the life of self or wife—

(1) With a company existing on 1st November 1844 (1853, c. 34, s. 52; c. 91, s. 1);

(2) With a company registered under the Joint-Stock Companies Act, 1844, or the Companies Acts (1853, c. 91, s. 1);

(3) With the National Debt Commissioners (1889, c. 18, s. 6);

(4) With registered friendly societies (1889, c. 35, s. 1).

These provisions were made perpetual in 1860 (c. 14, s. 11).

They do not extend to foreign insurance companies (*Colquhoun* v. *Heddon*, 1890, 25 Q. B. D. 127).

This deduction cannot be made so as to bring the income below £160, and must not exceed one-sixth of the income (1853, c. 34, s. 54).

Relief.—No deductions may be made by the assessing authority or the taxpayer except those specified under the schedules. Annual payments out of profits or gains may not be deducted from the assessment in computing the amount to be paid. Nor are deductions allowed for loss by diminutions of capital employed, or for loss sustained in a trade, etc., or profession, etc. (1842, s. 159; *Alexandria Water Co.* v. *Musgrave*, 1883, 11 Q. B. D. 174).

But where losses reduce the income below the estimate or assessment relief can be obtained in the case of trades, professions, or farming from the general commissioners on notice to the Surveyor of Taxes (1890, c. 8, s. 23). The relief is accorded by certificate of exemption or abatement.

Exemptions.—1. *Constructive.*—The Crown is not within the Income Tax Acts. This means—

(*a*) That the Queen pays no income tax;

(*b*) That the public revenues are not income within the Acts;

(*c*) That landed property in the occupation of servants of the Crown for public purposes of the Crown is not the subject of income or profit within the Acts, if the occupation is in substance that of the Crown itself, and not that of a tenant of the Crown. By the Crown is here meant the Sovereign as a constitutional entity. The exemption does not extend to the private estates of the Sovereign which are subject to income tax paid out of the privy purse (25 & 26 Vict. c. 37, s. 8). But it does extend to buildings used for purposes of administration of justice, police, *e.g.* for Courts of assize or County Courts, or police Courts (*R.* v. *Manchester*, 1854, 3 El. & Bl. 336; *Adam* v. *Inland Revenue*, 1889, 2 Tax Cas. 541), or police

stations (*Coomber* v. *Berks Justices*, 1883, 9 App. Cas. 61). Prisons being vested in the Crown (40 & 41 Vict. c. 21) are also within the exemption. Property occupied for purposes of local government is not within this exemption (see *Coomber's* case, *supra*). The Crown cannot extend its immunity to any natural or legal person by letters patent or charters purporting to exempt from tax or toll (1842, c. 35, s. 187). Even the Commissioners of Income Tax are subject to tax under Sched. D (1842, c. 35, s. 135).

2. *Specified.*—(*a*) Lands and stock vested in the Trustees of the British Museum are specifically exempted (1842, c. 35, s. 149), and their income being derived from a parliamentary grant and showing no possibility of profit is also exempt.

Apart from this specific provision the museum would fall within the next exemption as a charity (*British Museum* v. *White*, 1826, 2 S. & S. 594; *Hodgson* v. *Carlisle L. B.*, 1857, 8 El. & Bl. 116).

(*b*) *Charities.*—*I.e.* the income from property held on trust for "charitable purposes" so far as it is so applied, including rents, etc., under Sched. D; dividends, etc., under Sched. C; and interest, etc., under Sched. D (1842, ss. 61, 88, 105). This excludes trading profits, even if applied to charitable purposes under trust (*St. Andrew's Hospital, Northampton* v. *Shearsmith*, 1887, 19 Q. B. D. 624; *Trustees of Psalms and Hymns* v. *Whitwell*, 1890, 3 Tax. Cas. 7).

The meaning of charitable purposes in this exemption was exhaustively considered in *Commissioners of Income Tax* v. *Pemsel*, [1891] App. Cas. 531, which decides that when the Commissioners refuse to certify allowance of the exemption the legality of their refusal can be reviewed by MANDAMUS.

The substantial effect of the case, is that charitable purposes are those understood by English law, namely, such purposes as "charitable uses" and within the Charitable Trusts Acts. They fall into four main divisions—(*a*) to relieve poverty; (*b*) to advance education; (*c*) to advance religion; (*d*) to effect other purposes beneficial to the community (per Ld. Macnaghten, *l.c.* p. 583).

(*c*) *Ecclesiastical Purposes.*—The income of trust funds invested in the public funds and solely applicable, and so far only as actually applied to the repairs of a building used *solely* for purposes of divine worship (1842, c. 35, s. 88).

(*d*) *Hospitals, Public Schools, and Almshouses* (1842, c. 35, s. 61) are exempted from Sched. A, as to their public buildings, offices, and premises, when not occupied by an officer in receipt of an income exceeding £150 (£160) per annum, and not let at a rent. A theological college has been held not to be within this exemption (*Bain* v. *Free Church of Scotland*, 1897, 24 Rettie, 496).

It is said that a hospital to be within the section must be maintained wholly or to a substantial extent *by* charity (*Needham* v. *Bowers*, 1888, 21 Q. B. D. 436; *Cawse* v. *Nottingham Lunatic Hospital*, [1891] 1 Q. B. 585; see HOUSE TAX). But this is regarding it by the source and not the use of its remedy, and puts it in a distinct category from public school or almshouse.

Public schools maintained partly by endowment and not run for profit are within the exemption, *e.g.* the City of London School (*Blake* v. *London* (*Mayor*), 1887, 19 Q. B. D. 79); and see HOUSE TAX.

Rents and profits of such institutions derived from lands are exempt so far as applied to the purposes of the institution (1842, c. 35, s. 61; and see *Maughan* v. *Free Church of Scotland*, 1893, 3 Tax Cas. 207). The mode in

which the exemption is framed shows that the draftsman had in view (1) incorporated charities, or (2) charitable trusts under ordinary trustees.

(*e*) *Literary and Scientific Institutions.*—The tax under Sched. A is not levied on any building which is owned by a literary or scientific institution, and is used solely for the purposes of the institution, and is not occupied by any officer of the institution or person paying rent for the building, and on which no payment is made or asked for instruction (1842, c. 35, s. 61 (vi.)).

The exemption applies to public libraries established under the Public Libraries Acts (*Manchester Corporation* v. *M'Adam*, [1896] App. Cas. 500). It has been held not to extend to professional institutions, such as the College of Surgeons, Edinburgh (1892, 3 Tax Cas. 173), and the Society of Writers to the Signet (1886, 2 Tax Cas. 227): but the decision of the House of Lords in the case of the Institute of Civil Engineers (*Inland Revenue Commissioners* v. *Forrest*, 1890, 15 App. Cas. 334) accorded exemption where it accords exemption to property legally appropriated and applied to promote mechanical or engineering science, and not the professional interest or advantage of the members.

(*f*) *University Buildings.*—Property tax (Sched. A) is not levied on the public buildings in any university of Great Britain or any college or hall therein unless it is occupied by an individual member of the university, etc., or by a person paying rent (1842, s. 61).

(*g*) *Friendly Societies and Trades Unions.*—The stock, dividends, or interest of a friendly society legally established under the Friendly Societies Acts (see 1896, c. 25) are exempt from Sched. C (1842, c. 35, s. 88; 1853, c. 34, s. 49) if the rules of the society provide against the assurance to a member or his nominee of more than £300, or an annuity of more than £30. They are also exempt in respect of interest on money lent and all other profits and gains under Sched. D (1853, c. 34, s. 49), and are exempt from Sched. A as to their lands, etc., to the same extent as a college or hall in a university (1889, c. 42, s. 12).

Trade Unions, if duly registered, are exempt from tax under Schedules A, C, and D, in respect of interest and dividends applicable and solely applied for provident benefits expressly authorised by the registered rules.

Provident benefits are in substance the same as benefits given by friendly societies (56 & 57 Vict. c. 2, ss. 1, 3; 60 & 61 Vict. c. 25). The exemption is claimed in the same way as in the case of income for charitable purposes (s. 2).

(*h*) *Industrial and Provident Societies.*—A registered industrial and provident society is exempt from income tax under Sched. D, unless it sells to persons not members thereof or unless the number of its shares is limited by its rules or practice. This does not exempt members or employees from assessment (56 & 57 Vict. c. 39, s. 24).

(*i*) *Savings Banks* established or continued under the Savings Bank Act, 1863 (26 & 27 Vict. c. 87). The exemption relates to stock or dividends of the bank invested with the National Debt Commissioners, and the dividends or interest payable by the bank on funds deposited by any depositor or charitable institution (1842, c. 35, s. 88).

Penny banks and other savings banks are exempted from Schedules C and D, in respect of their income so far as it is in payment or credit of interest to depositors not exceeding £5 in the year in which it is claimed. If the depositor's annual income exceeds £160 he must return his dividends from savings banks where paid without deduction (1894, c. 30, s. 36).

(*j*) *Individuals*, whether natural or legal persons, whose income from all

sources does not exceed £160 (1894, c. 30, s. 34 (1); *Tennant* v. *Smith*, [1892] App. Cas. 150; *M'Dougall* v. *Sutherland*, 1894, 3 Tax Cas. 261).

Husband and wife are one person for the purpose of this exemption where they live together (1842, c. 35, s. 45); subject to the proviso that where a wife has an income from a profession, trade, employment, or vocation, or office or employment of profit, whose profits, gains, or remuneration are chargeable under Schedules D or E, it is treated as separate from the husband's where the joint income does not exceed £500 (1897, c. 24, s. 5; see *Bowers* v. *Harding*, [1891] 1 Q. B. 560).

Where sole income or family income as above is under £500 an abatement of £160 is allowed (1894, c. 30, s. 34 (1)).

Where the computed income falls short of estimate so as to give a claim for exemption or abatement, relief is given under the Acts of 1842 (ss. 133 and 134) and 1853 (ss. 28, 29, 31).

The exemptions are claimed under secs. 163 to 170 of the Act of 1842. Fraudulent claims are punishable by fine and liability to treble duty (ss. 88, 99).

MANAGEMENT AND COLLECTION.—Under the Taxes Management Act, 1880 (43 & 44 Vict. c. 19), the income tax and the other assessed taxes are under the general supervision and control of the Board of Inland Revenue, who are appointed under the Inland Revenue Regulation Act, 1890 (53 & 54 Vict. c. 21). See INLAND REVENUE. Under their orders and directions are the following officers:—

1. *Surveyors.*—Surveyors of taxes appointed and paid by the Treasury, and subject to penalties for misconduct in office (1842, s. 37; 1880, c. 19, ss. 17, 18), and under oath of secrecy (1842, s. 38).

Their duties are to deliver notices and forms to the assessors (1880, c. 19, s. 16), to examine returns made by taxpayers and assessments, to serve notices on persons omitted by the assessors, to amend assessments, and make surcharges under Schedules A, B, and D (1842, c. 35, ss. 57, 75, 115, 116; 1880, c. 19, ss. 51, 52), and to act as assessors (1) in the metropolis, (2) or any parish where assessors are not appointed or do not act (1880, s. 43).

2. *General Commissioners.*—The commissioners for the general purposes of income tax are chosen from the Land Tax Commissioners (1842, c. 35, ss. 4–8), at a meeting convened by the Commissioners of Inland Revenue. They divide themselves into sub-committees of *district commissioners* for the various districts (1842, c. 35, ss. 4–15; 1880, c. 19, ss. 27, 28, 29, 30–35, 40, 41, 42–46). They are concerned with assessments under Schedules A, B, and E, as to offices not under the Crown and not connected with railways, and nominate the assessors, and appoint their own clerks and assistants.

The basis of their assessment is parochial, subject to the powers given by the Taxes Management Act, 1880, to rearrange parishes (ss. 36–38).

3. *Additional Commissioners* are chosen under sec. 16 of the Act of 1842, by the general commissioners for any district, and have to deal with statements of profits and gains under Sched. D (1842, c. 35, ss. 111–117). They make assessments thereon if satisfied thereon, or refer them to the general commissioners, or assess on their own judgment where the statements are not made or are insufficient. If the surveyor or inspector is dissatisfied with the principle on which they have gone, he may require statement of a special case for the general commissioners (s. 112), or may certify to those errors which he has discovered on which they are to amend the assessment (s. 115), and if he objects to the amount of the assessment, he states his objections in writing, and gives notice to the taxpayer to

attend before the general commissioners (1842, c. 35, s. 116; 1880, c. 19, s. 63). A list of assessments is made out and certified, and fourteen days after delivery to the general commissioners or the surveyors of taxes may be communicated to each taxpayer affected (1842, c. 35, s. 117).

4. *The Special Commissioners* consist of the Commissioners of Inland Revenue and other persons appointed by special warrant by the Treasury (1842, c. 35, s. 23; 1880, c. 19).

Their functions are to assess dividends from colonial and foreign public stocks, or from stocks in foreign or colonial companies (1842, ss. 29, 96; 1853, c. 34, s. 19), and the profits of English railways, and the salaries of their officers, under Sched. E (1860, c. 14, ss. 5, 6), and when required, to assess profits, etc., under Sched. D (1842, s. 131). They also hear appeals under Sched. D, if the person assessed or surcharged prefers going to them than to the general commissioners (1842, s. 130), and appeals as to assessments on mines or quarries (1860, s. 7). They also examine and decide on claims for exemption under Sched. C (1842, s. 98), and of rents of hospitals, public schools, almshouses, and charities under Sched. A (1842, s. 62), and for abatement or diminution of income under Sched. D.

5. *The Commissioners under Sched. E* are appointed under secs. 30–34 of the Act of 1842, as modified by sec. 26 of the Act of 1853. Their duties and procedure are prescribed by secs. 150–158 of the Act of 1842, and they also assess the interest on securities issued from public departments under Sched. C (1842, s. 97).

All these commissioners occupy a quasi-judicial position as an assessing tribunal of original or appellate jurisdiction, from audience before which lawyers are absolutely excluded. They are not under the direct control of the Inland Revenue, but are subject to a series of regulations under the Income Tax Acts and the Taxes Management Act, 1880, with reference to the examination, amendment, or allowance of assessments and the hearing of appeals.

6. *Assessors.*—The general commissioners appoint the assessors, whose duties are, however, regulated by the Acts, and their discharge of them is supervised by the surveyors of taxes on behalf of the central authority.

7. *Collectors of taxes* are nominated for parishes or groups of parishes by the Land Tax Commissioners and general commissioners annually in April, or in default of nomination are appointed by the Board of Inland Revenue. They may be required to give security to the Crown by bond, or to the general commissioners. Parishes are not liable for the acts, neglects, or defaults of collectors appointed by the Board, or who have given security to the Crown (1880, c. 19, ss. 73–79).

Assessment.—The assessments are made after notice to, and returns by, the taxpayer under Schedules A, B, and D. If no return or an insufficient return is made, the commissioners may assess or surcharge the taxpayer. Whether assessed or surcharged, he is entitled to appeal if aggrieved (1842, c. 35, ss. 161, 162). When assessments under Schedules A and B are allowed, notice is given of a day for hearing appeals before the general commissioners (1842, ss. 80–86; 1880, c. 19, s. 57; 1896, c. 28, s. 28). Appeals from assessments under Sched. D lie to the general or the special commissioners at the option of the taxpayer (1842, ss. 118, 130; 1853, s. 55). Appeals on points of law raised before general or special commissioners are allowed by special case, which must be stated by the commissioners on the demand of the appellant or the Surveyor of Taxes. The case goes in the first instance to the Queen's Bench Division of the

High Court, but can be taken to the Court of Appeal and House of Lords (1880, c. 19, s. 59).

Collection.—The collection of income tax is regulated by secs. 82–89 of the Taxes Management Act, 1880. The tax can be enforced by distraint and sale on refusal to pay on demand (s. 86). The distraint takes priority of landlord's claims for rent (s. 88). If there is no sufficient distress, the defaulter can be committed to prison by the general commissioners till he gives bail or security to pay the tax and the costs of apprehending him and conveying him to prison (s. 89). Penalties exceeding £20 under the Income Tax Acts, except those directed to be added to the assessments, are recovered in the High Court within twelve months of the accrual of the liability (1880, c. 19, s. 21). See INLAND REVENUE.

[*Authorities.* — Dowell, *Income Tax Laws*, 4th ed., 1895; Highmore, *Inland Revenue Regulation Acts*, 1896.]

In commendam. — The holding of benefices *in commendam* (mainly used as a device for eking out the value of the smaller Sees) has been abolished by the operation of the Ecclesiastical Commissioners Act, 1836 (6 & 7 Will. IV. c. 77), s. 18, which enacted that after the passing of that Act "no ecclesiastical dignity, office, or benefice shall be held in commendam by any bishop, unless he shall so hold the same at the time of passing thereof; and that every commendam thereafter granted, whether to retain or to receive, and whether temporary or perpetual, shall be absolutely void to all intents and purposes."

[*Authorities.*—As to the old law of commendams, see Godol. *Rep. Can.* 230; Gibs. *Codex*, 912; Ayliffe, *Parergon*, 191.]

Incompetency of Witnesses.—Both in civil and criminal cases persons adduced as witnesses who in the opinion of the judge are prevented by extreme youth or mental infirmity from understanding the questions put to them, or giving rational answers, are excluded as incompetent to testify. In criminal cases the accused person and his or her wife or husband are excluded as incompetent, except in those cases where this incompetency has been removed by statute (see a list of the statutory exceptions in Stephen, *Digest of the Law of Evidence*, 1893 ed., art. 108 A), or in proceedings against a husband or wife for any bodily injury inflicted upon his or her wife or husband (Stephen, *Digest*, arts. 106–108 A). See titles EVIDENCE; WITNESS.

Incongruity.—In *Rowles* v. *Mason*, 1612, 2 Brownl. 200, it was said that "tithes cannot be appurtenant to a manor, insomuch that it is incongruent; and turbary cannot be appurtenant to land, insomuch as it is incongruent; but it ought to be to a house."

Inconsistent Clauses.—"Where there are two clauses in a deed, of which the latter is contradictory to the former, then the former shall stand (per Nicholas, B., in *Cother* v. *Merrick*, 1657, Hard. 94; *In re Webber's Settlement*, 1850, 17 Sim. 222). This rule of construction is applied only in the last resort (Elphinstone, *Interpretation of Deeds*, 91–93).

In the case of wills the later of two inconsistent clauses is preferred

(*Ulrich* v. *Litchfield*, 1742, 2 Atk. 372), but in *In re Spencer, Hart* v. *Manston*, 1886, 34 W. R. 527, where a testator used a printed form of a will with blank spaces, one of which he filled up by giving all his real and personal estate (with two specific exceptions) to A. T. H., and then after an interval in blank inserted a clause giving the whole of his residuary estate to certain other persons for their own use and benefit absolutely, it was held that the first residuary gift to A. T. H. was not revoked by the second residuary gift, that nothing remained upon which the second gift could operate, and that the first gift prevailed (see Theobald, *Law of Wills*, 4th ed., 617–619). See BLANKS IN WILLS.

Inconsistent Enactment.—Sections of an Act of Parliament are to have effect as substantive enactments without introductory words (see 52 & 53 Vict. c. 63, s. 8). It is a cardinal principle in the interpretation of a statute that if there are two inconsistent enactments, it must be seen if one cannot be read as a qualification of the other (see *Ebbs* v. *Boulnois*, 1875, 10 Ch. App. at p. 484). If two sections are repugnant, the rule is that the last must prevail (see *Wood* v. *Riley*, 1867, L. R. 3 C. P. at p. 27).

[*Authorities.*—Hardcastle on *Statutes*, 2nd ed.; Maxwell, *Interpretation of Statutes*, 3rd ed.]

Inconsistent Relief.—A statement of claim must state specifically the relief claimed by the plaintiff, which may be stated simply or in the alternative (R. S. C. Order 20, r. 6). To claim inconsistent relief, however, is embarrassing. Thus in *Evans* v. *Daniel*, 1878, 10 Ch. D. 747, where the writ claimed, first, an injunction to restrain the defendants from committing a breach of an agreement for a lease; secondly, damages for the breach; and thirdly, recovery of possession of the premises comprised in the agreement, it was held that this was embarrassing; an injunction was granted, but without costs, on the ground that the inconsistent relief claimed placed the defendants in great difficulty. So, too, in *Bevan* v. *Barnett*, 1897, 13 T. L. R. 310, it was decided that a claim for rent accrued due subsequently to the service of a notice to repair amounted to a waiver of forfeiture for breach of a covenant to repair, and was inconsistent with a claim for possession on the ground of forfeiture. See PLEADING.

Inconvenience.—By the London Building Act, 1894, s. 90, subs. 3, a building owner is not to exercise any right given him by the Act in such manner or at such time as to cause unnecessary inconvenience to the adjoining owner or occupier. On the corresponding section in the Metropolitan Building Act, 1855, it was held in *Thompson* v. *Hill*, 1870, L. R. 5 C. P. 564, that a building owner who pulled down a party-wall was not bound to protect by a hoarding or otherwise the rooms of the adjoining owner which were left exposed, but under the Act of 1894, s. 90, subs. 2, he is bound to erect and maintain at his own expense a proper hoarding for the protection of the adjoining owner in such a case.

Incorporate—To form into a corporation either by charter or by statute. See INCORPORATION.

Incorporated Law Society.—This Society was founded in 1827, and is incorporated by charter (2 Will. IV. & 8 Vict.). Its membership is confined to solicitors and retired solicitors, and election is by ballot. Its affairs are managed by a council of the members, who are empowered to perform its statutory duties (Solicitors Act, 1877, s. 19; 1888, s. 17). There is a club in connection with the Society.

The Society is the representative body of the solicitors practising in England and Wales, and its existence as such has been frequently recognised by the Legislature. Under the Solicitors Act of 1843 (s. 21), it was appointed registrar of the rolls of solicitors, and the custody of the rolls was transferred to it on the abolition of the office of "clerk of the petty bag" (Solicitors Act, 1888). It issues the annual certificates enabling solicitors on the rolls to practice (Solicitors Act, 1860, s. 21; 1888, s. 16), and conducts the examinations by which candidates must qualify themselves for admission to the rolls (Solicitors Act, 1877, s. 5). It has certain powers to exempt candidates from the whole or part of the *intermediate* examination (Solicitors Act, 1894, s. 3). The Society has for many years undertaken the duty of bringing cases of misconduct by solicitors before the Court. By the Solicitors Act, 1888, the Master of the Rolls was directed to appoint a committee of its council to hear all applications made to strike the name of a solicitor off the rolls, or to require a solicitor to answer allegations (of misconduct) contained in an affidavit (s. 13). But an application to the committee is not a condition precedent to an application to the Court (*In re Weare*, [1893] 2 Q. B. 439). Unless the application is made by the solicitor himself, or no *primâ facie* case of misconduct is made out, the committee report their finding of the facts to the Court. The Society has power to recover penalties for wrongfully acting as a solicitor (Solicitors Act, 1860, s. 26).

In recent years the Society has done much to modify the course of intended legislation and rule-making in the interest both of the public and of the legal profession.

See SOLICITOR, and, as regards procedure on applications against solicitors before the statutory committee, see Trevor and Lake's *Solicitors Act*, 1888.

Incorporation—An expression in the law principally used in the following connections:—

By Act of Parliament.—See COMPANY; MUNICIPAL CORPORATIONS.

By Royal Charter.—See ROYAL CHARTER.

Certificate of.—See COMPANY.

Of Company.—See COMPANY.

Of Inhabitants of Burgh.—See MUNICIPAL CORPORATIONS.

Of Lands Clauses Acts in Private Act.—See LANDS CLAUSES ACTS.

Of Railways Clauses Act.—See RAILWAY.

Of Railway Company.—See RAILWAY.

Of Documents in Wills.—By English law a will may consist of more than one document; to the original will duly executed may be attached one or more codicils, also duly executed, and the original will and the codicils must be read together.

So a will may incorporate and substantiate by reference other papers, such as a list of furniture or a marriage settlement; but there are these differences between a codicil and an incorporated paper of this kind, that a codicil is later in date than the original will; the incorporated paper must be

in existence before the will is executed. Codicils, on the other hand, require due execution in the presence of two witnesses in accordance with the Wills Act (1 Vict. c. 26, s. 9), while incorporated papers do not.

A codicil is effective by virtue of its own inherent force as a validly executed testamentary paper; so far as formalities go, it is a good will in itself. An incorporated paper has no effect apart from the validly executed document on which it rests. It follows that a codicil, being itself such a validly executed document, may incorporate and give force to an informal paper or memorandum just as much as the original will.

In the leading case (*Allen* v. *Maddock*, 1858, 11 Moo. P. C. p. 427) the principle was clearly enunciated that "A will or codicil not duly executed may be rendered valid by a later codicil duly executed and referring clearly to it"; but where an invalid memorandum or paper is sought to be incorporated it must "be so described as to leave no doubt in the mind of the judge on the circumstances as they actually existed and are proved before him that the paper referred to is the paper propounded."

The decided cases suggest the following rules for incorporation:—

(1) Where a duly executed will or codicil clearly refers to an informal paper, the former makes operative the latter (see cases cited: Probate Rules, N. C. B., r. 12).

(2) And if that paper itself refers to other papers they will in turn be incorporated in the same way in the original document (*Synes* v. *Appelbee*, 1888, 57 L. T. 599).

(3) The informal paper must be referred to in the incorporating document; but the Court will admit parol evidence for the purpose of identification (*Allen* v. *Maddock*, where it was said parol evidence is admissible to show the state of the testator's mind), but not to prove intention (see also *Goods of Brewis*, 3 Sw. & Tr. 473; *Utterton* v. *Robins*, 1834, 1 Ad. & E. 423).

The identity has been held to be sufficiently established in the following cases: the informal memorandum was enclosed in a sealed envelope, the codicil confirming it being executed on the outside (*Goods of Almosnino*, 1 Sw. & Tr. 508); a paper purporting to be a copy of an original will was produced to witnesses at the time of the execution of a codicil which referred to this copy, it was held that the copy was incorporated (*Goods of Mosies*, 1869, L. R. 2 P. & D. 91). Where one gift was referred to appearing in a memorandum containing a long list of gifts, it was held that the whole memorandum was incorporated (*Goods of Daniell*, 1883, 8 P. D. 14). The case of *Gould* v. *Lakes*, 1881, 6 P. D. 1, carries the principle to its furthest limit, there being therein direct written reference to the incorporated paper. But if the paper produced materially contradicts the description of it given in the will; or if the only evidence of incorporation is that it was found tied up with the will, this will not be sufficient (*Goods of Greaves*, 1 Sw. & Tr. 250; *Goods of Matthias*, 1863, 32 L. J. P. & M. 115; see also *Goods of Pascall*, 1868, L. R. 1 P. & D. 606; *Goods of Luke*, 1865, 34 L. J. P. & M. 105; *Goods of Garnett*, [1894] Prob. 90).

The mere fact that the writing to be incorporated is written on the same sheet of paper as the will is not by itself sufficient (*Singleton* v. *Tomlinson*, 1878, 3 App. Cas. 404), and that even though the will and the informal writing are both in the testator's handwriting (*Goods of Torey*, 1878, 47 L. J. P. & M. 63); *secus*, of course, if there is sufficient reference apart from the mere fact of contiguity (*Goods of Widdrington*, 1866, 35 L. J. P. & M. 66; *Goods of Heathcote*, 1881, 6 P. D. 30).

(4) Entries in a ledger, or any other document which could not be pro-

duced, and has not been admitted to probate, may yet be sufficiently incorporated to be conclusive for the purposes of the will (*Quihampton* v. *Going*, 1876, 24 W. R. 917; *Goods of Balme*, [1897] Prob. 261).

(5) The memorandum must have been in existence at the time the will or codicil supporting it was executed (Probate Rules, N. C. B., r. 13; see also *Goods of Sunderland*, 1866, L. R. 1 P. & D. 198; *Goods of Sims*, 1868, 17 L. T. 619; *Durham* v. *Northen*, [1895] Prob. 66).

(6) Where, however, a will refers to a paper afterwards to be executed and signed by the testator, and after the paper has been written and signed a codicil is executed republishing the will, the latter speaks as from the date of the subsequent codicil, and incorporates the paper *ex post facto*, provided the paper is duly signed and identity established (*Goods of Truro*, 1866, L. R. 1 P. & D. 201); *secus* if it is not (*Goods of M'Gregor*, 1889, 60 L. T. 840).

(7) The paper will not be incorporated unless it will have some legal effect (*Goods of Ouchterlony*, 3 Sw. & Tr. 175). Where a foreign will and an English will exist dealing with different property, the English document will not generally incorporate the foreign one (*Goods of Murray*, [1896] Prob. 65); *secus* if the rights of the English executors are affected (*Goods of Howden*, 1874, 22 W. R. 711).

Incorporeal Chattels.—Incorporeal chattels are such incorporeal things as pass on their owner's death according to the mode of devolution, which came to be characteristic of chattels (see CHATTELS), that is to say, to his executor, if he left a will, or if he died intestate, to his administrator, not his heir. The distinction between corporeal and incorporeal things, which was imported from Roman into English law, was not so much applied to chattels as to hereditaments (see CORPOREAL HEREDITAMENTS). The orthodox classification of chattels personal is to divide them into choses in possession or in action (*q.v.*), rather than to distinguish them as being corporeal or incorporeal (*Co. Litt.* 351; Finch, L., bk. ii. ch. ii.; Hale, *Analysis of the Law*, ss. 23, 26, 41, pp. 41, 50, 75, 6th ed.; 2 Black. *Com.* 389; Fry, L.J., *Colonial Bank* v. *Whinney*, 1885, 30 Ch. D. 261, 285). There is no doubt, however, that if the classification of personal things as being in possession or action be propounded as exhaustive, the term "things in action" must, at least in modern times, be extended beyond its original meaning, and the test of distinction taken must be that which the English law adopts in dividing corporeal from incorporeal things. Thus choses in possession are tangible, moveable things, of which their owner may have actual possession and enjoyment. They are goods which a man may have in his own keeping, which he may transfer to others by delivery on a gift or sale, which may be taken away from him by a trespasser or thief, and which he may retake, if he be wrongfully deprived of them. In other words, choses in possession are corporeal chattels, and are distinguished by incidents exactly similar to those on which the English law insisted as characteristic of corporeal hereditaments (*q.v.*). A chose in action, in the extended sense of the word, appears to be a thing which, if wrongfully withheld, you must bring an action to realise; a thing, which you cannot take, but must go to law to secure. Incorporeal things, however, are defined as *ea quæ in jure consistant*, and the sense of this in English law seems to be things, for which a man must go to law; for right in English law especially means a claim enforceable at law, that is, a claim which must or may be pursued by action (Bract. fo. 10 *b*, 98 *b*; *Litt.* s. 451; *Co. Litt.* 265 *a*, 285 *a*, 291 *b*, 345; Finch, L. 106). Incorporeal chattels, therefore, appear

to coincide with such things in action (in the wide sense of the term) as are of the nature of chattels. Thus they include all personal things in action, strictly so called according to the old law, which appear to be all rights of action to recover debt, damages, or the like, and all such other personal things as would be extinguished by a release of all actions (*Diggs's* case, Moore, 133, pl. 279; *Litt.* ss. 512, 513; *Co. Litt.* 257 *a*, 288, 289 *a*, 292 *b*); the benefit of an obligation arising from contract before there has been any breach of contract, whether the breach would result in a debt or sound in damages only (*Litt.* s. 512, 513; *Co. Litt.* 144 *b*, *n* (1), 292 *b*; 2 Black. *Com.* 397, 346; *Ex parte Ibbetson*; *In re Moore*, 1878, 8 Ch. D. 519; *Brice* v. *Bannister*, 1878, 3 Q. B. D. 569; *Walker* v. *Bradford Old Bank*, 1884, 12 Q. B. D. 511); stock in the public funds (*Dundas* v. *Dutens*, 1790, 1 Ves. Jun. 196, 198; *Wildman* v. *Wildman*, 1803, 9 Ves. 174, 177) and similar property, such as India, Colonial Government, or Municipal Corporation Stock (Wms. *Pers. Prop.* 279, 14th ed.); and shares in joint-stock companies (*Humble* v. *Mitchell*, 1839, 11 Ad. & E. 205; *Colonial Bank* v. *Whinney*, 1885, 30 Ch. D. 261, 286; 11 App. Cas. 426, 439, 446, 447). It must be admitted, however, that there are some things which may well be described as incorporeal chattels, but have not yet received judicial recognition as choses in action. Among these are the exclusive privileges known as COPYRIGHTS and PATENTS, and the right to use particular TRADE MARKS or TRADE NAMES. All these rights are certainly incorporeal property, as being things which are incapable of actual possession; and as they pass on death to the executor or administrator, they are of the nature of chattels. It seems, however, that there is at least as good ground for including those rights within the class of choses in action, in the wide sense of the term, as there was for extending that term to stock or shares. One reason given for holding stock and shares to be things in action, was that they are incapable of manual transfer (see the cases cited above); so are copyrights, patents, trade marks and trade names. Again, these privileges are the benefit of a duty of forbearance, and that duty, if not freely rendered, can only be exacted by action. This seems a good reason for classing such things among choses in action, and none the less that the duty is incumbent on all and not on some particular person. The point, however, is certainly not beyond the reach of controversy.

[*Authorities.*—See Williams, *Pers. Prop.* 7, 234, 11th ed.: 27, 38–41, 14th ed.; *Law Quarterly Review*, ix. 311; x. 143, 303; xi. 64, 223, 238.]

Incorporeal Hereditaments.—By incorporeal hereditaments is meant such immoveables as besides passing to the heir and not to the personal representative are also by their nature intangible and invisible. An incorporeal hereditament is therefore a mere right exerciseable upon or in connection with something of a corporeal nature. "Corporeal hereditaments are the substance which may be always seen, always handled; incorporeal hereditaments are but a sort of accident which inhere in, and are supported by, that substance, and may belong or not belong to it without any visible alteration therein. Their existence is merely in idea and abstracted contemplation, though their effects and profits may be frequently objects of our bodily senses" (2 Black. *Com.* 20). Besides this distinction between possessory ownership and a mere right not coupled with or entitling the owner to possession, there existed before the passing of the Real Property Act, 1845, another marked distinction between corporeal and incorporeal hereditaments, namely, in the respective modes

of transferring them; for the former could not be transferred without livery of seisin or possession, and were said to "lie in livery," but did not, on the other hand, require any written words to perfect the transfer, whereas the latter could be validly transferred by deed only, and were said to "lie in grant." This second distinction, however, is not now of importance in view of sec. 2 of the Act (8 & 9 Vict. c. 106), which provides that all corporeal hereditaments shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery. Estates in expectancy (*e.g.* reversions, remainders, and executory interests) are incorporeal hereditaments by nature, and the distinctions mentioned as to actual possession, and also as to the mode of transfer, apply to them. But their nature is of a transient character, for an estate in expectancy may in time become an estate in possession, and thereupon it ceases to be incorporeal and becomes corporeal. To distinguish from these incorporeal hereditaments others whose incorporeal nature is permanent, the latter are called "purely incorporeal hereditaments," and it is of this class only that we shall now treat. For the former class, see REVERSION; REMAINDERS; EXECUTORY INTERESTS.

The principal kinds of purely incorporeal hereditaments are—advowsons, tithes, profits à prendre (*e.g.* rights of common), easements (*e.g.* rights of way, light, etc.), offices, dignities, franchises, pensions, annuities, and rents. For a detailed consideration of each of these the reader should refer to the respective titles in other parts of the work; we can only here treat of them generally. Incorporeal hereditaments may be: (1) appendant to corporeal hereditaments; (2) appurtenant to corporeal hereditaments; (3) in gross.

Incorporeal hereditaments which are appendant or appurtenant pass by force of the conveyance by whatever means effected that serves to transfer the corporeal hereditaments to which they are so appendant or appurtenant. The distinction between appendant and appurtenant cannot be clearly explained without entering at some length into the subject of prescriptive rights (see PRESCRIPTION, and cp. also the case of *Angus* v. *Dalton*, 1881, 6 App. Cas. 740), where the learning on the subject is stated. Suffice it to say shortly, that an incorporeal hereditament is said to be appendant when the right of which it consists has been from time immemorial given by implication of law only to the owner of the land to which such right is incident, and such right is not only incident but also necessary, *e.g.*, the most important instance, a right of common appendant. This right is created by the implication of law for the encouragement of agriculture, and, indeed, "for the necessity of the thing. For when lords of manors granted out parcels of lands to tenants . . . these tenants could not plough or manure the lands without beasts; these beasts could not be sustained without pasture; and pasture could not be had but in the lord's wastes, and on the uninclosed fallow grounds of themselves and other tenants. The law, therefore, annexed this right of common as inseparably incident to the grant of the lands" (2 Black. *Com.* 33; *Tyringham's* case, 4 Co. Rep. 36: and see *Baring* v. *Abingdon*, [1892] 2 Ch. 374). An incorporeal hereditament appurtenant is one that is not originally annexed, as a natural and necessary incident to the hereditament, etc., to which it is appurtenant, but becomes so by express grant or by prescription, sometimes in the case of copyholds even by local custom.

It was the custom previously to the passing of the Conveyancing Act, 1881, to insert not only the words "together with the appurtenances," but also what were known as "general words," in order to preclude the question arising as to whether certain particular rights or easements not

perhaps strictly appendant or appurtenant passed, or not, under the conveyance of the land or tenement in connection with which they existed. As a general rule, the words "with their rights, easements, and appurtenances," were not enough to pass this latter class of incorporeal hereditaments (cp. *Brown* v. *Alabaster*, 1888, 37 Ch. D. 490, and cases there cited; *Barkshire* v. *Grubb*, 1881, 18 Ch. D. 616; *Beddington* v. *Atlee*, 1887, 35 Ch. D. 317; *Baring* v. *Abingdon*, *loc. cit.*).

But now sec. 6 of the Act (44 & 45 Vict. c. 41) enacts that a conveyance of land made after the passing of the Act shall be deemed to include, and shall, by virtue of the Act, operate to convey with the land all the privilege, easements, and rights appertaining or reputed to appertain to the land. This section, therefore, does away with the necessity of inserting "general words" in a conveyance. It applies, however, only so far as a contrary intention is not expressed in the conveyance. As to what is or is not sufficient to show a "contrary intention" within subsec. 4, see *Broomfield* v. *Williams*, [1897] 1 Ch. 602, and cases there cited.

It is a long-established principle of English Law that for hereditaments to be appendant or appurtenant one to the other, they must be of a nature and quality suitable to the relationship of principal and adjunct, so that this relationship may exist without incongruity (cp. Butler's note to *Co. Litt.* s. 121 *b*, quoted in *Capel* v. *Buszard*, 1829, 6 Bing. 150); but subject to this it may, in view of the section noticed in the Conveyancing Act, be stated as a general rule that all incorporeal hereditaments, appendant or appurtenant actually or reputedly to lands, pass without being expressly mentioned by a conveyance of the lands.

But the principal and the adjunct may be separately conveyed: the incorporeal hereditament is then said to be "in gross." We may define an incorporeal hereditament in gross as one that is neither appendant nor appurtenant—that is, not an adjunct to any principal having a separate and isolated existence as a subject of property purely personal to the owner (see RENT; RENT-CHARGE).

Many incorporeal hereditaments are capable of being either appendant or appurtenant or in gross, *e.g.* advowsons.

Incorporeal hereditaments are governed practically by the same laws and principles as corporeal hereditaments. The same estates (*i.e.* fee, tail, life, etc.) may be acquired in both, and by the same number of tenants (*i.e.* in severalty, joint-tenancy, etc.). There is a distinction, however, between the two as regards the validity of the limitation of the estate, namely, although the rule that there cannot be a valid limitation of an estate to commence *in futuro* applies as well to corporeal hereditaments as to incorporeal hereditaments *in esse*, it does not apply to incorporeal hereditaments to arise *de novo*, and a grant of, *e.g.*, a rent-charge created *de novo* to commence *in futuro* is perfectly good. Nor are incorporeal hereditaments the subject of tenure. It is for this reason that they were not until quite recent statutory intervention liable to escheat. For on the death intestate, and without an heir of the owner in fee of an incorporeal hereditament, it is not a tenure, but a very existence that ceases, and there is nothing to revert to the lord as in the case of land or escheat to the Crown, *e.g.* in the case of a *profit à prendre* it ceases to exist, and the hereditament on which it was charged thereupon is freed from it. But now, by the Intestate Estates Act, 1884 (47 & 48 Vict. c. 71, s. 4), it is enacted that where a person dies without an heir and intestate in respect of any real estate, whether legal or equitable in any incorporeal hereditament, the law of escheat shall apply in the same manner as if the estate or interest were a legal estate in corporeal hereditaments.

As incorporeal hereditaments did not lie in livery, and they could not be actually and physically the object of seisin, the old right and doctrine of general occupancy in the case of an estate *pur autre vie* never applied to them; though there could be special occupancy of them by the heir-at-law. And it was accordingly thought that the statutes that abolished general occupancy (Statute of Frauds, and 14 Geo. II. c. 20) could not have application in a class of property of which there never had been general occupancy, so as to confer the power of testamentary disposition on tenants *pur autre vie* of incorporeal hereditaments (*e.g.* a rent-charge). It was said (cp. 2 Black. 260) that on the death of a grantee *pur autre vie* a grant of such hereditaments was determined, and that they were neither deviseable nor vested in the executors nor went in course of distribution. But already, in 1710, the Courts held from time to time that the old statutes did apply (*Rawlinson* v. *Duchess of Montague*, 3 P. Wms. 264 *n*; and see also *Bearpark* v. *Hutchinson*, 1831, 7 Bing. 178); and finally the Wills Act, 1837, in repealing the sections of the old statutes, expressly mentions (1 Vict. c. 26, s. 3) among the property that may be disposed of by will estates *pur autre vie*, whether there shall or shall not be any special occupant thereof, and whether the same shall be a corporeal or an incorporeal hereditament; and as to the like estates *pur autre vie* undisposed of by will, it is provided (s. 6) that in case there shall be no special occupant such estates shall go to the executor or administrator; and if such estate shall come to the executor or administrator either by reason of the Act or by special occupancy, it shall be assets in his hand, and shall go and be distributed in the same manner as the personal estate of the testator or intestate.

Incorrigible Rogue.—See VAGRANT.

Increase, Affidavit of.—See TAXATION.

Incroachment.—See ENCROACHMENT.

Incumbent.—The word "incumbent" (Latin, *incumbo*) is a general word describing the holders of parochial benefices. It will include a rector, vicar, and perpetual curate. The meaning of the word is, to be diligently resident.

As to the origin and status of a rector, vicar, and perpetual curate respectively, *vide sub titulis.*

By canon law a layman was not capable of holding a benefice (*capax beneficii*); but if he was presented, admitted, and instituted, he was *incumbent de facto* at common law, and acts done by him, *e.g.* the making of leases, were good; but he was liable to be deprived by sentence declaratory, *quia mere laicus* (*Costard* v. *Winder*, 1600, Cro. (1) 775; but see 2 Roll. Ab. 220; *Bedingfield* v. *Archbishop of Canterbury*, 1570 (12 & 13 Eliz.), 3 Dyer, 292 *b*).

The Act of Uniformity (14 Chas. II. c. 4, s. 10) provides that no person shall be capable to be admitted to any benefice before he shall be ordained a priest according to the ordination form in the Prayer Book, unless he have formerly been made priest by episcopal ordination. A deacon or even a layman may be presented; but he must be in priest's orders before admission.

As to the holding of benefices in the Church of England by clergymen of the Episcopal Church of Scotland, see article CHURCH OF ENGLAND (27 & 28 Vict. c. 94). The Colonial Clergy Act, 1874, 37 & 38 Vict. c. 77 (which, however, does not affect the provision of the Act 27 & 28 Vict. c. 94), provides (ss. 3, 4) that no person ordained priest or deacon by any bishop other than a bishop of the Churches of England or of Ireland shall officiate as such in any church or chapel in England without the written consent of the archbishop of the province, and without making the declaration contained in the Clerical Subscription Act, 1865; or be admitted or instituted to any benefice or ecclesiastical preferment in England, or act as curate therein, without the written consent of the bishop of the diocese in which the same is situate. When such person has held ecclesiastical preferment or acted as curate for a period or periods exceeding in the aggregate two years, he may apply for a licence from the archbishop, which, if he obtains, will place him in the same position as a clergyman ordained by a bishop of the Churches of England or Ireland (s. 5). The penalty for officiating contrary to these provisions is £10, and an incumbent allowing such an offence is liable to a similar penalty (s. 7). The provisions of the Act do not apply to a person who has held preferment or a curacy in the Church of England.

As to ignorance of the Welsh language as a ground for the non-institution or deprivation of incumbents in Wales, see article WALES.

As to the presentation, admission, institution, induction, reading in, age, etc., of incumbents, and also as to incumbents of donations, see articles PRESENTATION; ENTRY ON BENEFICE; SIMONY.

As to the nature of the estate of an incumbent in his glebe, etc., see GLEBE; TITHES; ECCLESIASTICAL CORPORATIONS.

As to working of mines on glebe, waste, etc., see GLEBE.

As to the ministration of sacraments, see BAPTISM; COMMUNION (HOLY).

As to preaching, see SERMON.

As to dilapidations, see DILAPIDATIONS, ECCLESIASTICAL.

Every beneficed clergyman has cure of souls, and no clergyman has the right to publicly read prayers or otherwise officiate in any church or chapel, although the latter be unconsecrated, within the limits of a parish without the consent of the incumbent (see Canon 71 of the Canons of 1603; *Trebec* v. *Keith*, 1742, 2 Atk. 497; *Jones* v. *Jelf*, 1863, 8 L. T. 399; *Richards* v. *Fincher*, 1874, L. R. 4 Ad. & Ec. 255; *Barnes* v. *Shore*, 1846, 1 Rob. 382; 8 Ad. & Ec. 640; *Freeland* v. *Neale*, 1848, 1 Rob. Eccl. 643); and where two or three persons are gathered together who do not strictly form part of a family, there is a congregation, and the reading to them of the Church service is a reading in public, and such congregations to be lawful would require registration, etc., as Nonconformist places of worship. The Liberty of Worship Act, 18 & 19 Vict. c. 86, excepts from the provisions of this Act, and legalises services conducted by the incumbent and his curate, or a congregation in a private dwelling-house, or any congregations meeting occasionally in a building not usually employed for religious worship. And it appears that, with or without the consent of the incumbent, the archbishop of the province or bishop of the diocese has the right to preach in any church or consecrated chapel in the province or diocese.

It is the duty of the incumbent to keep the register of baptisms, marriages, and burials. (See PARISH REGISTERS.)

The incumbent of the parish is still chairman *ex officio* of the vestry (see article VESTRY; *Wilson* v. *M'Math*, 1819, 3 Barn. & Ald. 241; 22 R. R. 371), except in the Metropolis (as to which, see article VESTRY; Metropolitan Local Government Act, 1894, s. 30 (1)); but the incumbent

of each London parish continues an *ex officio* member of a metropolitan vestry (see 18 & 19 Vict. c. 120, s. 2).

Taxation of the Property of Incumbents.—The property of incumbents is liable by way of taxation to first-fruits, tenths (as to which, see ANNATES; QUEEN ANNE'S BOUNTY), and land tax (see LAND TAX).

Rates.—In Anglo-Saxon times the property of the clergy was charged to castles, bridges, and expeditions. Under the influence of the canonists they were at a later period held exempt from all tolls, customs, porterage, etc., but this is subject to the proviso that no Act of Parliament has otherwise provided, and is now of no practical importance.

Incumbents are chargeable to the poor law rate (*R.* v. *Turner*, 1718, 1 Stra. 77).

They are also liable to payments for watch and ward, repair of highways, county rates, etc., and are chargeable both in respect to their glebes and tithes. The house and glebe lands of the incumbent will be rated in the same way as any other property in the parish (as to rating of tithe rent-charge, see TITHES; and see, further, article RATES).

An exchange of livings may be effected between two incumbents, both holding spiritual benefices. To effect this, it is necessary first to obtain a licence from the Ordinary to treat of exchange. When this has been obtained, an exchange is effected by one deed, by which each party agrees to exchange his benefice, and for such purpose both resign them into the hands of the Ordinary. The deed when executed is delivered to the registrar of the bishop. If one incumbent is instituted and inducted into the other's benefice, yet if the exchange is not executed on both parts, the other may have the benefice again. The deed should, however, also contain a proviso avoiding the resignation in case the exchange is not carried out (see *Rumsey* v. *Nicholl*, 1877, 2 C. P. D. 294), for otherwise the patron may select another person to fill the benefice, after an absolute deed of resignation has been executed, and the party who has executed such deed will have no right of action against him.

As to simoniacal exchanges and resignations, see SIMONY. As to plurality and commendam, see PLURALITY. As to sinecures, see SINECURE. As to lunacy of an incumbent, see LUNACY. As to bankruptcy of incumbent, see SEQUESTRATION.

An incumbent may be deprived by common or statute law for the following offences (Phillim. *Eccl. Law*, 2nd ed., vol. ii. 1082 and 1083):—

Want of orders (see *ante*).

Illiteracy (see *Colt* v. *Bishop of Coventry*, 1617, 14 Jac. Hob. 140, at p. 149). This is a *malum in se*, like want of orders, and can be affected by no dispensation.

Want of age (see PRESENTATION).

Simony (see SIMONY).

Plurality (see PLURALITY).

Conviction of treason, murder, or felony. As to this, see Felony Act, 1870 (33 & 34 Vict. c. 23, s. 2), and the Clergy Discipline Act, 1892 (55 & 56 Vict. c. 32, s. 1); and see Phillimore's *Eccl. Law*, 2nd ed., vol. ii. pp. 1037 and 1083, and article DISCIPLINE, ECCLESIASTICAL.

Refusing to use the Book of Common Prayer, or administer the sacraments as therein prescribed, speaking in derogation thereof, or using any other ceremony, and thereof being twice convicted (*Martin* v. *Mackonochie*, 1880, 6 P. D. 87; *Combe de La Bere*, 1881, L. R. 6 P. D. 157).

Not reading the Thirty-Nine Articles and making the declaration of assent (see ENTRY ON BENEFICE).

Maintaining or affirming any doctrines contrary to the Thirty-Nine

Articles, and persisting therein after conviction (see article ARTICLES, THE THIRTY-NINE).

Miscreancy, infidelity, schism, or heresy (see HERESY).

Incontinence.

Drunkenness.

Conviction of perjury.

Disobedience to constitutions made by proper authority for the government of the Church (see Memorandum, 1604, Cro. (2) 37; *Heywood* v. *Bishop of Manchester*, 1884, 12 Q. B. D. 404).

Non-payment of tenths under 26 Hen. VIII. c. 3, s. 15.

Dilapidation or alienation (but this is doubtful) (see DILAPIDATIONS, ECCLESIASTICAL).

Non-residence (see PLURALITY).

If a bastardy order is made against an incumbent. If adultery is proved against him in a divorce or matrimonial cause, or if in such cause an order for judicial separation is made against him. A separation order under the Matrimonial Causes Act, 1878. See Clergy Discipline Act, 1892, s. 1, subss. *c*, *d*, and *e*.

The canon law adds also certain other causes of deprivation, of which the principal are—

Disclosing confessions, even for fear of death. But as to this see Canon 113 of the Canons of 1603, and article CONFESSION AND ABSOLUTION.

Demanding money for sacraments.

Violating a sanctuary.

Bigamy (see articles CELIBACY OF THE CLERGY; BIGAMY).

Concubinage.

Contumacy in wearing an irregular habit.

Officiating after excommunication. Irregular intrusion into a benefice.

Keeping fasts other than those appointed by law (see Canon 72 of the Canons of 1603).

As to the course of procedure, etc., in such cases, see article DISCIPLINE, ECCLESIASTICAL.

As to Resignation.—A resignation should be made to the Ordinary, except in the case of a donative, when it is to be made to the patron with power to admit. The resignation need not be made before a notary, and once made and agreed to by the bishop, is complete and cannot be withdrawn, although by arrangement the formal acceptance is to be as from a later date (*Reichel* v. *Bishop of Oxford*, 1889, 14 App. Cas. 259). The bishop must, however, consent to the resignation, if it is to be valid; it is undecided whether he has the power to refuse without assigning any, or any sufficient, cause. The resignation must be unconditional (*Gayton's* case, 1592, 34 Eliz. God. Rep. 277), except in the case of an exchange of benefices, as to which see *supra*. Bishops always had, and frequently exercised, the power of assigning to the incumbent, who had resigned, a pension from the revenues of the benefice; and statutory provision for this has now been made by statute 34 & 35 Vict. c. 44 (the Incumbents Resignation Act, 1871). This Act provides that an incumbent who has held a benefice for seven years continuously may notify to the bishop that he desires to retire, on the ground of mental or physical infirmity, and the bishop may issue a commission to five persons to inquire into the matter, and if they report that the resignation is expedient, and the patron consents, or if, the patron not consenting, the archbishop declares that the resignation shall be accepted, the bishop declares the pension to be allowed. This, by the statute above mentioned and an amending Act of 1887 (50 & 51 Vict. c. 23), must not exceed one-third of the annual value of the benefice, and varies

with the yearly corn averages, unless no part of the income of the benefice is derived from tithe rent-charge on glebe lands. A lunatic, by sec. 18 of the Act of 1871, may resign by his committee. The pension, by secs. 10 and 15, is a charge on the revenues of the benefice, and is recoverable as a debt from the incumbent; but it is not transferable, and ceases on the enrolment of a deed of relinquishment under the Clerical Disabilities Act, 1870 (33 & 34 Vict. c. 71); and the bishop may, subject to an appeal to the archbishop, diminish or cause to cease altogether the pension of a retired clerk who has since his resignation undertaken clerical duties elsewhere. The costs of the inquiry are borne wholly by the incumbent if the Commissioners declare the resignation inexpedient, otherwise half by him and half by a charge on the revenues of the benefice (s. 16). Although the pension is recoverable as a debt in law or equity from the incumbent, such incumbent cannot set off against it a judgment debt due to him from the retired clerk (*Gathercole* v. *Smith*, 1881, 17 Ch. D. 1); but he may now set off sums due in respect of dilapidations; but the sums so withheld must not in one year, without the consent of the bishop of the diocese, exceed half the total amount of the pension (Incumbents Resignation Amendment Act, 1887, s. 6; see also article DILAPIDATIONS, ECCLESIASTICAL). The annual value of the benefice, for the purpose of a pension, means the net annual value exclusive of the incumbent's place of residence, and after deducting all rates, taxes, and charges, including the salary of a curate compulsorily employed, and annual payment in respect of any terminable mortgage having more than two years to run when the Commissioners sit (1871 Act, s. 11; 1887 Act, s. 5). See also article RESIGNATION BONDS.

As to emblements, see GLEBE; see also articles CLERGY; CHURCH OF ENGLAND; SEQUESTRATION.

[*Authorities.*—Lind. *Prov.*; Gibs. *Cod.*; Ayliffe, *Par.*; Watson, *Clergyman's Law*; Degge, *Parson's Counsellor*; Phillimore, *Eccl. Law*, 2nd ed.; Cripps, *Law of the Church and Clergy*; Black. *Com.*]

Incumbrance.—See MORTGAGE.

Incur.—A person who gives a new bill in renewal of an old one "incurs a debt or liability" within the meaning of sec. 13 (1) of the Debtors Act, 1869 (*R.* v. *Pierce*, 1887, 56 L. J. M. C. 85). In giving judgment in that case Lord Coleridge, C.J., said (p. 88): "As to the last point taken on behalf of the prisoner, that here he had not incurred a debt or liability within the meaning of sec. 13 (1) because the credit had been obtained upon the renewals of already existing bills, I am bound to say I do not think there is anything in it whatever. To my mind it is perfectly plain that he did incur a fresh liability when he obtained these different renewals."

Incurramentum—Any penalty to which a person may be subject. The word is sometimes given as "incurrementum," and sometimes as "incurrimentum."

In custodia legis.—See CONTROL AND CUSTODY OF COURT.

Indebitatus assumpsit.—See ASSUMPSIT.

Indebted.—In table A in the first schedule to the Companies Act, 1862, which contains regulations which may be adopted for the management of a company limited by shares, article 10 provides that "the company may decline to register any transfer of shares made by a member who is indebted to them." The word "indebted" here used is not limited to indebtedness in respect of the shares proposed to be transferred, but is to be construed in its grammatical sense as meaning indebted in any way (*Ex parte Stringer*, 1882, 9 Q. B. D. 436), nor does it apply only where the proposed transferor of the shares is the sole debtor; it applies equally where he is jointly and severally liable with some other person (per Hall, V.C., in *In re Bentham Mills Spinning Co.*, 1879, 11 Ch. D. 902; see also Buckley, *Companies Acts*, 7th ed., pp. 493–495).

Indecency.—Any indecent exhibition in public is indictable as a public nuisance at common law, if calculated to cause scandal, shock modesty, or corrupt morals. The place in which the indecency takes place must be a place of public resort, or even a place not open to the public in which a number of persons may be offended and several see it (*R.* v. *Webb*, 1848, 18 L. J. M. C. 39; *R.* v. *Thallman*, 1863, 33 L. J. M. C. 58; *R.* v. *Holmes*, 1853, 22 L. J. M. C. 122; *R.* v. *Harris*, 1870, L. R. 1 C. C. R. 282; *R.* v. *Wellard*, 1884, 14 Q. B. D. 63).

Most of these cases turn on exposure of the body naked. Bathing near a public way falls within the definition (*R.* v. *Reed*, 1871, 12 Cox C. C. 1). The offence is punishable on indictment by imprisonment with hard labour (14 & 15 Vict. c. 100, s. 15), or fine, or both, and bail is discretionary (5 & 6 Geo. IV. c. 83, s. 4; 11 & 12 Vict. c. 42, s. 23).

It is also an offence punishable on summary conviction for persons of either sex—

(1) Wilfully, openly, lewdly, and obscenely to expose the person on or in view of a street, road, or highway, or in a place of public resort, with intent to insult any female (5 Geo. IV. c. 83, s. 4). See VAGRANT.

(2) Wilfully and indecently to expose the person to the annoyance of the inhabitants or passengers in a street in a town (10 & 11 Vict. c. 89, s. 28).

Persons who commit any offence against public decency in a public bath or washhouse, open bathing place, or covered swimming bath may be excluded (41 & 42 Vict. c. 14, s. 11).

It is also an indictable misdemeanour to keep a place for showing an indecent exhibition in a public place, or where the public are admitted on payment (*R.* v. *Saunders*, 1875, 1 Q. B. D. 15).

Sending obscene or indecent matter through the post is punishable either summarily or on indictment, but only on the prosecution of the Postmaster-General (33 & 34 Vict. c. 79, s. 20; 47 & 48 Vict. c. 76, s. 4 (2)).

Affixing, or delivering, or distributing indecent advertisements is punishable under the Indecent Advertisements Act, 1889 (52 & 53 Vict. c. 18). See OBSCENE LIBEL. Indecent assaults on males are dealt with under ABOMINABLE CRIME, and on females under RAPE, etc. Obscene language is dealt with under CURSING, and indecent conduct by prostitutes under PROSTITUTE.

Indefensus—"One that is impleaded and refuses to make answer" (Tomlins, *Law Dict.*).

Indefinite Payment.—See APPROPRIATION OF PAYMENTS.

Indefinite Trust.—A private, as distinguished from a charitable, trust, must be certain and definite—that is, the subject-matter and the object of the trust must be definite, otherwise the Court will not carry it into effect. A trust in favour of charities, on the other hand, will be effectuated although the testator may have left uncertain the particular mode by which his intention is to be carried out.

Indemnity—A contract express or implied "to keep a person who has entered, or is about to enter, into a contract of liability indemnified against that liability independently of the question whether a third person makes default or not" (per Davey, L.J., in *Guild* v. *Conrad*, [1894] 2 Q. B. 896); it thus differs from a guarantee (*q.v.*), which is "a promise to pay the creditor if the principal debtor makes default in payment" (*ibid.*). The latter contract, but not the former, is within sec. 4 of the Statute of Frauds. Familiar examples of contracts of indemnity are policies of fire and marine insurance; the insurance company in such cases agreeing to make good loss sustained by the assured (see *Darrell* v. *Tibbitts*, 1880, 5 Q. B. D. 560). Further instances of contracts of indemnity will be found in the law of agency; an agent having a right to be indemnified by his principal for all losses and liabilities properly incurred by him in the execution of the agency (see PRINCIPAL AND AGENT). As to the indemnity of trustees, see secs. 24 and 45 of the Trustee Act, 1893; of partners *inter se*, see sec. 24 of the Partnership Act, 1890, the general principle applicable to these persons being the same as in cases of ordinary agency.

By R. S. C. Order 16, rr. 48 and 55, a defendant who claims to be entitled to contribution or indemnity over against any person not a party to the action, or against any other defendant, may, by leave of the Court or judge bring in such person by a third-party notice. The word "indemnity" here used means an indemnity on some contract express or implied, or on some equitable principle, or under some statute (*Birmingham and District Land Co.* v. *London and North-Western Rwy. Co.*, 1886, 34 Ch. D. 261). A right to damages is not a right to indemnity as such (*ibid.*). (See also *Wynne* v. *Tempest*, 1896, 66 L. J. Ch. 81, and other cases cited in notes to Order 16, r. 48, in *Annual Practice*.) See GUARANTEE; PRINCIPAL AND SURETY.

Indemnity, Act of.—See BILL OF INDEMNITY; HABEAS CORPUS, *ante*, p. 129; MARTIAL LAW.

Indenture.—See DEED; LEASE.

India.—For legal purposes the term India includes British India, together with any territories of any native prince or chief under the suzerainty of Her Majesty, exercised through the Governor-General of India, or through any governor or other officer subordinate to the Governor-General (Interpretation Act, 1889, s. 18, subs. 5). See the article BRITISH INDIA.

India, Church in.—See CHURCH OF ENGLAND.

Indian Appeals.—See PRIVY COUNCIL.

Indian Army.—By the Government of India Act, 1858 (21 & 22 Vict. c. 106), which vested the territories and government of the East India Company in Her Majesty, the military and naval forces of the Company, and all persons thereafter enlisting therein, were to continue subject to all Acts of Parliament, laws of the Governor-General in Council, and articles of war, etc., as had then been passed. The regular British troops of the Queen serving in India were subject to the Annual Mutiny Act, as if they were in England. The European troops of the Company raised for service in India only were subject to a perpetual Mutiny Act passed by the Imperial Parliament. The native Indian forces were subject to a military law different from both. In 1863 the two European forces were brought under the Mutiny Act, and three years previously the system of recruiting European troops for service in India only was abolished by 23 & 24 Vict. c. 100, which made the raising of forces for service in India only illegal. The native Indian forces continued, and are still, under their own Mutiny Act and Articles of War. These articles are contained in Act v. of the Legislative Acts of 1869, and in Act xii. of 1894 (the Indian Articles of War Amendment Act, 1894). Sec. 180 of the Army Act, 1881 (44 & 45 Vict. c. 58), provides that nothing therein shall prejudice or affect the Indian military law respecting officers or soldiers, or followers, in the Indian forces being natives of India; and on the trial of all offences committed by any such native officer, soldier, or follower, reference shall be had to the Indian military law, and to the established usages of the service; but courts-martial for such trials may be convened in pursuance of this Act. That is to say that the law administered is that of the Indian articles of war, etc.; but the officer convening the Court may be such an officer as is authorised by the Army Act to convene it (see COURTS-MARTIAL). No British-born subject, on the other hand, or any legitimate Christian lineal descendant of that subject, whether in the paternal or maternal line, is to be triable or punishable thereby, but such persons belonging to the Indian army are triable and punishable as if they belonged to the British forces. This is the combined effect of the Army Act and the Indian articles of war. Moreover, by the latter it is provided that the articles shall not render any Christian European, not being British born, or any Christian legitimate lineal descendant of any American or European, whether in the paternal or maternal line, triable by a court-martial composed of native commissioned officers. All such persons must be triable by European officers only. All the other persons subject to the Indian articles are governed by them wherever they may be serving (s. 180, subs. (*b*) Army Act, 1881): and every person enlisted under the Indian articles swears to serve and go wherever he is ordered, by land or sea. Whether the Indian troops, however, can constitutionally be employed by the Crown in time of peace outside India is a disputed question. It arose in 1878, when Indian troops were ordered to Malta; and the discussion mainly turned upon the construction of the words in the Mutiny Act, and now in the Annual Army Acts, empowering the Crown to raise a certain number of troops, "exclusive of the numbers actually serving within Her Majesty's Indian possessions." Lord Selborne con-

tended that by these words the native Indian army was excluded from the Crown's control outside India in time of peace, without the assent of Parliament; Lord Cairns, on the other hand, maintained that the Act excludes not the Indian native army at all, but the European forces actually serving in India for the time being (see Hansard, Parl. Deb., No. 240, pp. 187–348 and 362–614). It is quite clear that they could not be introduced into the United Kingdom in time of peace without consent of Parliament under the terms of the Army Acts. As to their employment outside India, it is also clear by sec. 55 of the Government of India Act, that except for preventing or repelling actual invasion of the Indian possessions, or under other sudden and urgent necessity, the revenues of India cannot, without the consent of both Houses of Parliament, be made applicable to defray the expenses of any military operation carried on beyond the external frontiers of such possessions. By sec. 54, also, of the Government of India Act, when any order is sent to India directing the actual commencement of hostilities by the forces in India, the fact of such order having been sent is to be communicated to Parliament within three months, if Parliament be sitting, unless such order shall have been in the meantime revoked or suspended; and if Parliament be not sitting at the end of such three months, then within one month after the next meeting of Parliament.

Certain modifications of the Army Act, 1881, in its application to Europeans serving as officers, and other persons belonging to the Indian forces, such as medical and other special service officers, who are not subject to the Indian military law and articles of war, are made by sec. 180 of that Act. When the Army Act, 1881, was passed, there was in each of the Presidencies of Madras and Bombay a separate commander-in-chief of the armies of those Presidencies; but by the Madras and Bombay Armies Act, 1893 (56 & 57 Vict. c. 62), the offices of the provincial commanders-in-chief were abolished, and it was enacted that for the purposes of sec. 180 of the Army Act, 1881, the commander-in-chief of the forces in India should be deemed to be the commander-in-chief in each Presidency. In the Army (Annual) Act, 1895 (58 Vict. c. 7), which made certain amendments to the Army Act, 1881, the necessary alteration of words in sec. 180 required to meet the altered conditions was enacted.

[*Authorities.*—Anson, *Law and Custom of the Constitution*, 2nd ed., pp. 280, 360, 361; Hansard, *supra*; *Manual of Military Law*, War Office, 1894.]

Indian Civil Service—The civil department of the government of British India, embracing certain judicial, revenue, and secretarial officers, formerly known as the Covenanted Civil Service. Admission to the Indian Civil Service is now by competitive examination held in England under regulations issued by Her Majesty's Secretary of State for India in Council, under the powers conferred by sec. 32 of the Government of India Act, 1858. Under these regulations (which are set out in the official *India List*) no person is eligible for examination for admission to the service, unless (1) he is a natural-born subject of Her Majesty; (2) his age will be above twenty-one and under twenty-three years on the first day of the year in which the examination is held; (3) he has no disease, constitutional affection, or bodily infirmity unfitting him, or likely to unfit him, for service in India; and (4) he is of good moral character. On the Civil Service Commissioners being satisfied on these points, the candidate is admitted to

the examination (which is held in London in August of each year), on payment of the prescribed fee (£6). Probationary candidates are selected from those examinees who obtain the highest aggregate number of marks in an open competitive examination, and those thus selected, before proceeding to India, are on probation for one year, during which they are tested as to their proficiency in riding, and at the end of which they have to undergo a compulsory examination on (1) the Indian Penal and the Criminal Procedure Codes, (2) the principal vernacular language of the province to which the candidate is assigned, and (3) the Indian Evidence Act and the Indian Contract Act, and in two of certain optional subjects. Successful candidates are then entitled to be appointed to the service, and are allotted to the various provinces.

In addition to those officials who form the service, formerly known as the Covenanted Civil Service, there are also others of a lower grade, called statutory civil servants, who must be natives of India, and who may be appointed to certain offices without certificates from the Civil Service Commissioners under the powers conferred by sec. 6 of the India (Laws and Regulations) Act, 1870.

Questions relating to the pay, leave of absence, pension, etc., of the Indian civil servants are dealt with in the Civil Service Regulations, a very full abstract of which is given in the *India List*.

Indian Council.—See British India.

Indian Law.—See British India; Hindu Law; Mohammedan Law.

Indian Railways.—Certain investments in the debenture or ordinary stocks and certain annuities of Indian railways, are authorised to be made by trustees by the Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 1, subss. (*i*), (*j*), and (*k*). They are railways in regard to which, in one form or another, and under various conditions, the Government of India either pays, or guarantees the payment of, the interest to the holders of the stock, which, by the definition clause, includes fully paid-up shares. There are six Indian railways under subs. (*i*) the interest on whose debenture stock is thus paid or guaranteed by the Secretary of State in Council of India.

There are three under subs. (*j*) which were purchased by the Government for which the purchase was in part effected by means of terminable annuities charged on the revenues of India. They are those mentioned in that subsection as the "B," "C," and "D" annuities. The "B" annuities of these railways (the Eastern Bengal, the East Indian and the Scinde, Punjaub and Delhi) have a sinking fund, and the annuitants get back at the termination of the annuities the principal at the time of their creation. The "C" and "D" annuities are those of the East Indian Railway Company, the latter being the deferred annuities, and the former annuities comprised in the register of annuitants, of the East Indian Railway Company. The "A" annuities of these railways are not authorised by the statute.

Under subs. (*k*) comes the ordinary stock of any railway company upon which a fixed or minimum dividend in sterling is paid, or guaranteed, by the Secretary of State in Council of India, or upon the capital of which the interest is so guaranteed.

It is to be noticed that if the Government should purchase other railways, other "B" annuities might be created, and would then fall under subs. (*j*). But the Government did not follow the plan in 1890 when the South Indian Railway Purchase Act, 1890 (53 Vict. c. 6), empowered money to be raised in the United Kingdom by the Secretary of State in Council of India for the purchase of that railway.

[*Authority.*—Marrack and Mathieson, *Statutory Trust Investment Guide.*]

Indian Registration Acts.—A system of registration of deeds has been in operation in India for over a century. The statutes now in force dealing with the subject are the Indian Registration Act, 1877, and the Transfer of Property Act, 1882, under which local registries are established in each district. The registration of certain documents is compulsory; in the case of others registration is optional. In the former class are included transfers of tangible immoveable property of the value of 100 rupees and upwards, transfers of reversions or other intangible things of whatever value, leases from year to year or for any term exceeding one year; in the second class are included leases for any term not exceeding one year, transfers of moveable property, and wills. In general, registration of documents, other than wills, must be effected within four months from the date of execution, from which date they operate, not from the date of registration. Documents the registration of which is compulsory have no effect unless registered; certain other documents which are, although not required to be, registered take priority over unregistered documents relating to the same property.

Indian Stock—Stock created under the authority of a number of Acts of Parliament, and issued by the Secretary of State in Council of India charged on the revenues of India.

By the Trustee Act, 1893, s. 1, a trustee may, unless expressly forbidden by the instrument (if any) creating the trust, invest any trust funds in his hands in, among other securities, India three and a half per cent. stock, India three per cent. stock, or in any other capital stock which may at any future time be issued by the Secretary of State in Council of India under statutory authority, and charged on the revenues of India.

Indians, North American. — The Spanish discoverers of America, imagining that they had arrived on the eastern coast of Asia, gave the name of Indians to the inhabitants whom they found in possession. The Red Indians, though not numerous (there are now about 300,000 in the United States and about 100,000 in Canada), form a well-marked division of the human race. Their marriage customs afford an illustration of primitive ideas of kinship; but the tribes have now for the most part adopted Christian habits. Land they have been accustomed to regard as belonging to the tribe; each efficient member of the tribe has a right to a share; but the shares are not equal, and an unworthy individual may be excluded altogether. The powers of the chiefs and of tribal councils are not exactly defined.

When Englishmen began to form settlements in America, they claimed for the Crown full sovereignty over the lands occupied, and they did not recognise any proprietary right in the natives. They recognised the tribes

as dependent or friendly nations, and entered into treaties with them; the rights secured to the Indians under such treaties were described and upheld by Chief-Justice Marshall in the case of *The Cherokee Nation* v. *The State of Georgia*, 5 Peters, 1; see also the cases cited in Wheaton's *International Law*, ch. ii. In the United States the Indians have often been driven from their homes by the advance of immigration, and many petty wars have been the result. In Canada, where the population is much less dense, the relations between white men and red men have been more friendly. All the colonies now forming the Dominion of Canada have legislated for the benefit of the Indians; the general objects of legislation have been, to reserve certain lands for Indian occupation; to prevent white men from purchasing or settling in the reserved territories; to prohibit the importation of spirits; and to make such provision for education, etc., as the tribes were willing to accept. Indians living in tribes, or in receipt of Government subsidies, have usually been excluded from electoral rights. By the British North America Act, 1867, s. 91, subs. 24, Indians and lands reserved for Indians are among the subjects placed under the legislative authority of the Dominion: but this does not preclude a province from claiming a beneficial interest in such lands (*St. Catherine's Milling Co.* v. *R.*, 1889, 14 App. Cas. 46).

[*Authorities.*—For Indian customary law, see the works of Schoolcraft, and the Reports of the Smithsonian Institute. Numerous documents bearing on the legal rights of the Indians were printed for the Judicial Committee of the Privy Council in the *St. Catherine's Milling Company's* case, cited above, and in an arbitration on a boundary question between Ontario and Manitoba, referred to the Committee in 1883.]

Indicavit—A writ in the nature of a prohibition (*q.v.*) which lay at the instance of a patron, and was directed to the Ecclesiastical Courts, prohibiting them from adjudicating in certain cases where the right of patronage came in question (3 Black. *Com.* 91).

Indictment.

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PRELIMINARY.

The law of England differs from that of Scotland and all Continental States in the fact that, as a general rule, no person can be put on his trial for a serious crime except upon a written accusation made against him by twelve or more men, not lawyers, resident in the district in which the trial is to take place: *i.e.* popular and not official opinion is an essential element

in this initial step in criminal procedure. See also CORONER. This written accusation has from very early times been styled an indictment (*indictamentum*), as distinguished from (1) an information charging an offence against Crown or revenue, made without intervention of a jury; (2) from a declaration or complaint by a subject as to some civil wrong cognisable by the common law; and (3) a bill in Chancery, setting forth grievances for which civil equitable relief was sought.

The origin of this procedure has been the subject of much learned speculation, the results of which are stated from different points of view in Huband on *Grand Juries in Ireland*, pp. 3–22, and by Pollock and Maitland (*Hist. Eng. Law*, vol. ii. pp. 644–652) and Pike (*Hist. Crime*, vol. i. pp. 120, 206; 1 Steph. *Hist. Cr. Law*, 251–272).

By the time of Henry II. the practice was established that offences should be presented in eyre, or on the sheriff's tourn by an inquest of at least twelve *legales homines*, who came to be styled the grand inquest or indictors. When the accusing jury, which put public rumour or ill-fame into a legal form in pursuance of public duty to inform of offences, was severed from the trial jury or petty jury is uncertain; but since 1351 (25 Edw. III. st. 5, c. 3) any grand juror put on a petty jury is liable to challenge for that cause (Y. B. 14 & 15 Edw. III., ed. Pike, Introd. p. xxvi.). Prior to that Act it had been the practice to put some jurors *pro rege* on the petty jury, and there is a modern instance of such a proceeding on a trial for treason (*R.* v. *Edmunds*, 1821, 1 St. Tri. N. S. 785, 883).

The grand jurors were also termed jurors *pro rege*. This title still survives in the formal commencement (*infra*).

They attend by summons of the sheriff. See JURY. Before they enter on their duties the foreman chosen by them is sworn by the following oath:—

> You, as foreman of this grand inquest for our Sovereign Lady the Queen for the body of this county of , shall diligently inquire and true presentment make of all such matters and things as shall be given you in charge touching this present service. The Queen's counsel, your fellows', and your own, you shall observe and keep secret; you shall present none through envy, hatred, or malice; neither shall you have anyone unpresented through fear, favour, or affection, gain, reward, or the hope thereof; but you shall present all things truly and indifferently as they shall come to your knowledge, according to the best of your skill and understanding. So help you God.

The other jurors take a similar oath (Huband, p. 166).

Not less than twelve nor more than twenty-three are sworn. On being sworn they are charged by the presiding judge as to all indictments presented after committal for trial by justices, or under the Vexatious Indictments Acts, or by order or leave of the Court. But they are also free to consider voluntary indictments or to present offences on their own knowledge, information, and belief.

The bills of indictment, *i.e.* the inchoate indictments, are then submitted to them in the grand jury room.

The names of the witnesses in support are indorsed on the bills, and such of them as the jury consider necessary to make out a *primâ facie* case are examined on oath, or affirmation, administered by the foreman or other grand juror, and the name of the person so sworn is initialled. If satisfied by a majority (twelve) (13 Edw. III. c. 13) that a *primâ facie* case is proved on the whole bill or any count of it, the jury return a true bill, in whole or part (*vera billa*), to the Court. This is done by the foreman indorsing the bill and delivering it in open Court to the presiding judge. If satisfied by a

majority (twelve) that the accusation is groundless, they throw out or "ignore" the bill, which is then indorsed by the foreman with the word *ignoramus*, and the bill so indorsed is returned to the Court. Signature by the foreman for self and fellows is usual, but is not essential if the bill is returned into open Court and read in his presence (*R.* v. *Sidolin*, 1833, 1 Lew. C. C. 55; *R.* v. *Thompson*, 1846, 1 Cox C. C. 268; Huband, 185).

When the bill has been found it becomes an indictment, and is communicated to the accused on arraignment.

The grand jury in finding a bill are not tied by any strict rules of evidence.

When no bill is sent before them they are still free to present offences with or without examining witnesses for the Crown, and the presentment is made in such a form as to state an offence committed within their county or an offence which under statute they may present. See VENUE.

The result of this procedure is summed up in the commencement of an indictment: "The jurors *for* our Lady the Queen upon their *oath present*." It is not till the bill is thus found that any objection can be taken to its form, validity, or relevancy.

And the adoption of these words is all that the grand jury now has to do with the frame of the indictment, the document itself being drawn up by the officer of the Court or the counsel of the prosecutor with the object of securing its validity in law.

Under an unrepealed statute of 1698 he may not charge more than two shillings for an indictment for felony under penalties, and if he draws it defectively must redraw it without fee or reward under like penalties (10 Will. III. c. 12, ss. 7, 8).

In cases not within these statutes it occasionally happens that the official if he draws the bill charges a fee to the prosecutor. But as all such officers are now paid by salary the demand savours of extortion.

Indictments were drawn up in Latin until the eighteenth century (see FALSE LATIN), and the accused was not entitled to a copy, but only to have the document once read over to him in English. This is still the rule, the only exceptions being in the case of TREASON and MISPRISION OF TREASON (indictments for which are specially regulated) and prosecutions by the law officers in the High Court for misdemeanours other than for non-repair of a bridge or highway (60 Geo. III. and 1 Geo. IV. c. 4, ss. 8, 10; *R.* v. *Dowling*, 1848, 7 St. Tri. N. S. 381; *R.* v. *Mitchell*, 1848, 6 St. Tri. N. S. 599).

The indictment is usually framed upon the depositions taken before the committing magistrate, and in cases within the Vexatious Indictments Act, 1859 (22 & 23 Vict. c. 17), the charges, except by leave of the Court, must be limited to those in the depositions. In the case of voluntary indictments this restriction does not apply.

Though now drawn up in English, indictments are still written on parchment, and wholly in words without any figures, except in the facsimile of a document, and are framed upon the old common law system of pleading, subject to certain statutory modifications, but mainly by copying old precedents. Under 1 Edw. III. st. 2, c. 17, they were required to be in duplicate. There is no modern work dealing exclusively with indictments except Saunders (2nd ed., 1889), which is not of high authority or accuracy. The older precedents are collected in Chitty's *Criminal Law*. The appendix to the 5th and 6th vols. of Cox's *Criminal Cases* contains a number of precedents framed after the amending Act of 1851. Many are collected in Archbold's *Criminal Pleading*, 21st ed., and in Russell on *Crimes*, 6th ed., and most criminal pleaders and officers of criminal Courts

have their own collections of precedents derived from tradition, industry, or bitter experience.

Subject-Matter.

The subject-matter of an indictment must be some act or omission which constitutes a public offence, and not merely a private wrong, *i.e.* must be—

1. Treason or misprision of treason.
2. Felony or misprision of felony, or being accessory before or after the fact to felony.
3. Misdemeanour or trespass against the peace, or aiding, abetting, counselling, or procuring the offence.
4. Attempting, or inciting, or conspiring to commit any of these offences.

All these matters are described in the parlance of the old law as pleas of the Crown; and the rule is illustrated by the necessity, until recent times, of concluding each count in an indictment by the words "against the peace of our Lady the Queen, Her Crown and dignity." This is often expressed by saying that an indictment will not lie except for a wrong of a public nature. See Criminal Law. In the case of misdemeanours the alternative procedure by criminal information is open at common law, though rarely used, and many petty misdemeanours created by statute or by-law are punishable summarily or by specially prescribed procedure (see *R.* v. *Hall*, [1891] 1 Q. B. 747).

The indictment consists of four parts: the *commencement*, *venue*, *statement*, and *conclusion*.

Commencement.

The formal commencement of an indictment is "The jurors *for* our Lady the Queen on their oath present." Where jurors have affirmed, it is needless to say so (6 & 7 Vict. c. 85, s. 2; 14 & 15 Vict. c. 100, s. 25). Second or subsequent counts or averments are prefaced by the words, and "the jurors aforesaid, on their oath aforesaid, do further present" *or* "say."

Venue.

The proper meaning of this term is the area from which the jurors are to come, under the writ *venire facias juratores*. Until 1825, when the jury laws were altered, it was necessary not only to state the venue on the margin of the indictment, but to specify a special venue as to each act or omission alleged therein. The marginal venue was and is a brief description of the area for which the Court is commissioned and sits; the special venue specified the subdistricts of the area, such as hundreds and the like, which were the *visne* (*vicinetum*) from which some of the petty jurors must come, the old theory being that the petty jury must be made up of neighbours who could speak as to the accused's reputation, which, rather than evidence, was the criterion of guilt, or were likely as neighbours to have the best knowledge of the facts.

Now only a marginal venue is stated (14 & 15 Vict. c. 100, s. 23), and want of a proper or perfect venue is immaterial (*ibid.* s. 24).

Where the offence is supposed to have been committed in the county of a borough or town, and is tried in the county at large, the name of the borough must be put in the margin or in the body of the indictment, and the name of the county at large may be put also in the margin (14 & 15 Vict. c. 100, s. 23; see also 38 Geo. III. c. 52).

Where an offence is not local, but may be tried in a particular district, the venue in the margin is the district for which the Court sits; and where the offence was committed outside England it is usually stated in the body of the indictment that it was committed "upon the high seas," or "without the realm," or "within Her Majesty's dominions," if proof of such fact is necessary to give jurisdiction.

The mode of stating venue is to insert in the margin at the top of the indictment the words ———— to wit, naming the county, borough, or other area for which the Court sits. In the case of the Central Criminal Court the marginal venue is "Central Criminal Court to wit." In the case of winter assizes or spring assizes the winter assize county or spring assize county is specified (see CIRCUITS AND ASSIZES). The rule is to make the venue coextensive with the local jurisdiction of the Court (*R.* v. *Stanbury*, 1861, 31 L. J. M. C. 88). Special provision is made for the venue in the case of offences committed in the county of a city, and tried in a neighbouring county at large. The statutes usually described as creating rules as to venue really create exceptions from the common law rule as to the local character of crime. They are dealt with under VENUE.

STATEMENT.

Averments.—Averments are preliminary or prefatory or subsidiary statements in an indictment, which the prosecutor proposes to verify in support of the charge, as an element in constitution or aggravation of the offence. They are in some cases described as inducements when they merely lead up to the main allegations. They may be introduced by the words, and "the jurors aforesaid on their oath aforesaid further say that," or by the words "and that"; or where the statement is quite subsidiary, by a participial clause, *e.g.* "being an officer, etc." They must never be made by way of recital, *e.g.* the word "whereas" must be avoided (see Archbold, *Cr. Pl.*, 21st ed., 62, 75).

Offences to be included.—An indictment consists of one or more counts (*contes*), each of which must charge a distinct offence, and one only.

This does not preclude description of an offence in such a way that, if certain of its elements are not proved, a jury may convict on the same indictment of a minor offence of the same class, whether felony or misdemeanour. Thus if murder be properly charged, the jury may negative *malice prepense*, and convict of manslaughter.

In other words, the circumstances stated in an indictment, if all proved, may constitute an offence liable to higher punishment, but even after negativing the circumstances of aggravation, enough of what is charged may be proved to constitute a less aggravated offence of the same class (see *Boaler* v. *R.*, 1887, 21 Q. B. D. 284; Archbold, 21st ed., 242, 243).

But unless a statute specifically allows it, an indictment for felony will not warrant a conviction for misdemeanour, or *vice versâ*. The chief statutory exceptions are as follows:—

1. In certain cases of felony the accused may be convicted, even if the facts constitute treason or misprision of treason (18 Geo. II. c. 30, ss. 2, 3; 37 Geo. III. c. 70, s. 3; c. 123, s. 7; 52 Geo. III. c. 104, s. 8; 11 & 12 Vict. c. 12, s. 7).

2. On charges of misdemeanour the accused may be convicted of the misdemeanour charged, even if the facts prove a felony, unless the Court prefers to discharge the indictment, and have a bill sent up for the felony (14 & 15 Vict. c. 100, s. 12; Archbold, 21st ed., 83); and a similar provision

is made for cases where false pretences are charged, and the evidence proves larceny (24 & 25 Vict. c. 96, s. 88).

3. On an indictment for felony or misdemeanour the accused may be convicted of the attempt, unless the attempt is a felony (14 & 15 Vict. c. 100, s. 9; *R.* v. *Connell*, 1853, 6 Cox C. C. 178); and on an indictment for robbery the accused may be convicted of assault with intent to rob (24 & 25 Vict. c. 96, s. 41).

4. A conviction for concealment of birth is permitted on an indictment for murdering a new-born infant (24 & 25 Vict. c. 100, s. 60).

5. On an indictment for rape or for felonious carnal knowledge of a girl under thirteen, the accused may be convicted of the misdemeanours created by secs. 3, 4, 5 of the Criminal Law Amendment Act, 1885, or of indecent assault (48 & 49 Vict. c. 69, s. 9) (see *R.* v. *West*, 1897, 67 L. J. Q. B. 62).

6. On indictments for felonious poisoning or felonious cutting, stabbing, or wounding, the accused may be convicted of unlawful poisoning or unlawful cutting, stabbing, or wounding (14 & 15 Vict. c. 19, s. 5; 24 & 25 Vict. c. 100, s. 25).

7. On indictments for felonious damage by rioters the accused may be convicted of unlawful and riotous damage (24 & 25 Vict. c. 97, s. 12).

8. Persons indicted for embezzlement or fraudulent application or disposition of property may be convicted—

(*a*) Of simple larceny.

(*b*) Of larceny as clerks or servants.

(*c*) Of larceny as persons in the public service or police. And, conversely, persons indicted for larceny may in a proper case be convicted of embezzlement or fraudulent application or disposition of property (24 & 25 Vict. c. 96, s. 72).

Joinder of Charges.—Treason.—See TREASON.

Felony.—It is bad pleading to use the word "or" in any part of an indictment. To do so in a count renders it disjunctive, and to that extent double. Alternatives, where they can be lawfully joined, are pleaded by distinct counts. It is also bad pleading to state two offences cumulatively in the same count. This is called pleading double. The rule does not apply to such charges as "forging and altering," or "destroying, defacing, and injuring," "making and concurring in making," "publishing and causing to be published" (see *R.* v. *Bradlaugh*, 1883, 15 Cox C. C. 217, 223) or any other case where in substance *one* transaction only is charged, such as stealing a quantity of property on a single occasion. Defects of this kind must be challenged by demurrer or motion to quash, and not by writ of error or motion in arrest of judgment, and are cured if the jury acquit of one of the two offences and convict of the other (*R.* v. *Nash*, 1863, 33 L. J. M. C. 94).

Subject to certain statutory exceptions, it is regarded as unfair and improper to include in the same indictment, whether in the same or in different counts, distinct charges of felony. Non-compliance with the rule is not fatal in point of law; but if the defect is challenged before pleading, the Court may quash the indictment; or if it is challenged after pleading, may put the prosecutor to his election on which charge he will proceed (*Castro* v. *R.*, 1883, 6 App. Cas. 229, 244; *R.* v. *Mitchell*, 1848, 6 St. Tri. N. S. 599). But if the defendant does not challenge the indictment before verdict, he cannot do so afterwards (see Archb., 21st ed., 79).

This rule does not apply to those indictments which really deal with a single or continuous transaction (see *R.* v. *Firth*, 1868, L. R. 1 C. C. R. 172),

but which vary the counts so as to exhaust the variety of degrees of culpability which the jury may infer from the evidence.

Thus on a charge of stabbing, different intents may be alleged in different counts.

In indictments for forgery it is the established and almost invariable practice to add a count for "uttering" the forged document.

Where there is doubt as to the ownership of stolen property, it is laid differently in different counts, and where the exact status of a person indicted for larceny as clerk or servant is open to controversy, he may be charged as clerk in one count and as servant in another.

In indictments of this kind a conviction can be obtained on one count only, according to the version of the facts or the inference of the jury; and the sentences are made concurrent on each count if the verdict is entered separately on each count (*O'Connell* v. *R.*, 1844, 5 St. Tri. N. S. 1).

These rules apply not only to the offence, but to the person. Two or more persons may not be joined in an indictment for felony unless they are charged as jointly concerned in its commission as principals or accessories before or after the fact, or as receivers (24 & 25 Vict. c. 94).

The statutory exceptions are—

1. Counts for offences against different sections of the Explosives Act, 1883, may be joined (46 & 47 Vict. c. 3, s. 7 (2)).

2. Three distinct acts of stealing, embezzlement, or fraudulent application or disposition of property by the same defendant against the same person, if committed within an interval of six months from the first to the last (24 & 25 Vict. c. 96, ss. 56, 71).

3. Counts for feloniously stealing and feloniously receiving the same property may be joined (24 & 25 Vict. c. 96, s. 92).

4. Any number of accessories before or after the fact at different times to the same felony may be indicted together, as may any number of receivers at different times of property feloniously stolen, etc. (24 & 25 Vict. c. 94, ss. 5, 6; c. 96, s. 93). But a defendant can be convicted as accessory *before* the fact, but not *after* the fact, on an indictment charging him as an accessory principal (*R.* v. *Fallon*, 1862, 32 L. J. M. C. 66; *Richards* v. *R.*, 1897, 13 T. L. R. 254).

Misdemeanour.—In theory, any number of misdemeanours can be included in one indictment, and it is not uncommon to have counts charging different defendants separately, or to mix up conspiracy counts with false pretences counts and the like, or charges on which the accused can be called as a witness with charges on which he cannot be called. Where such shuffling of the counts is calculated to prejudice a fair trial, the Court can put the prosecutor to his election, or sever the trials of the different defendants (see *Castro* v. *R.*, 1883, 6 App. Cas. 229, 244; *R.* v. *King*, [1897] 1 Q. B. 214; *R.* v. *Fussell*, 1848, 6 St. Tri. N. S. 723).

Description of the Offence.—As a general rule, the indictment must state positively and affirmatively (and not by way of recital), and with certainty, consistency, and particularity, the essential elements of the offence intended to be charged, both as to person, time, place, intent, and circumstances; and must show directly or by necessary intendment the jurisdiction of the Court to try it. Nothing need be stated which it is unnecessary to prove (14 & 15 Vict. c. 100, s. 24), and when such matters are stated they are treated as surplusage. But material omissions are fatal, if challenged before verdict. Where the offence has a *nomen juris*, it is usually considered prudent, but is not really necessary to mention it either by use of the proper verb or adverb, or by expressing it as the conclusion of a syllogism,

e.g. and "*so* the jurors aforesaid, on their oath aforesaid, . . . do say that A. B. . . . falsely, wickedly, wilfully, and corruptly did commit wilful and corrupt perjury" (*R.* v. *Hodgkiss*, 1869, 39 L. J. M. C. 14).

The syllogistic form of indictment is rare in English procedure, and was abolished in Scotland by the Criminal Procedure (Scotland) Act, 1887 (50 & 51 Vict. c. 35), which has consolidated and simplified the Scotch procedure to an extent not yet attained in England.

The objects of the insistence on precision are threefold—

1. To let the defendant know exactly and definitely what charge he has to meet, so as to determine whether it is one to which he is to plead not guilty, pardon, or AUTREFOIS ACQUIT or AUTREFOIS CONVICT, or whether he should challenge the validity of the indictment by demurrer or otherwise.

2. To enable the Court to know clearly what judgment can be legally passed on conviction.

Consequently everything which is not expressly stated or necessarily implied in the description of an offence is taken against the prosecution; or the contrary is presumed in favour of the defendant, if he chooses before verdict to claim the benefit of the presumption (Archbold, *Cr. Pl.*, 21st ed.; Steph. *Dig. Cr. Proc.*, art. 244).

There are some apparent exceptions to this rule, *e.g.* where a statute declares an indictment in its terms to be sufficient, which is in some cases held to justify a general charge without the particularity required at common law (see FRAUDULENT DEBTOR), and in the case of indictments for barratry, disorderly houses and gaming-houses, and conspiracy (*R.* v. *Gill*, 1818, 2 Barn. & Ald. 204; 20 R. R. 407), and incitement or attempt to commit an offence, where a charge in general terms is allowed, provided that the prosecution condescends to particularity in evidence, or submits to an order for particulars, if the Court deems it necessary. The certainty required is not absolute, but such as the nature of the offence permits, and less precision is required in stating matters of inducement.

Where the offence is at common law, the essential elements of the common law definition must appear, and the imposition of a statutory punishment does not affect the rule. Where it is created by statute, or subjected to a greater degree of punishment by statute, the essentials of the statutory definition must appear, and every exception, exemption, or proviso in the statutory definition must be negatived (*R.* v. *Harvey*, 1871, L. R. 1 C. C. R. 284), even if the onus of proof of them is on the defence.

In dealing with a statutory offence the pleader is not excused from particularity, but defects in this respect are cured by verdict (2 Geo. IV. c. 64, s. 21).

Particular statutory directions as to the description of the offence are given in the following cases:—

1. *Treason and Treason Felony.*—See TREASON.

2. *Murder and Manslaughter.*—The manner and means of causing death need not be stated (24 & 25 Vict. c. 100, s. 6).

3. *Perjury.*—See 14 & 15 Vict. c. 100, ss. 20, 21.

4. *Unlawful Oaths.*—See 37 Geo. III. c. 123, s. 4; 52 Geo. III. c. 104, s. 5.

5. *Corrupt Practices.*—See 26 & 27 Vict. c. 29, s. 6, incorporated in the subsequent Corrupt Practices Acts.

6. *Offences by Bankrupt.*—See FRAUDULENT DEBTOR.

7. *Obscene Libel.*—See 51 & 52 Vict. c. 64, s. 7.

8. *Previous Convictions.*—It is sufficient, after describing the subsequent offence, to add a statement that the defendant was at a certain time and place convicted of an offence punishable summarily or on indictment,

without otherwise describing the previous offence (7 & 8 Geo. IV. c. 28, s. 11: 24 & 25 Vict. c. 96, s. 116; c. 99, s. 37; 34 & 35 Vict. c. 112, ss. 9, 20).

Chattels.—Where they are the subject of an offence must be described specifically by their appropriate names: and see *Money*, *Property*, below.

Documents.—(*a*) In proceedings for stealing, embezzling, destroying, concealing, obtaining by false pretences or forgery a written instrument, it may be described by any name or designation by which it is usually known, or their purport, without setting out a copy or facsimile or otherwise describing it or its value (14 & 15 Vict. c. 100, ss. 5, 7; 24 & 25 Vict. c. 98, ss. 42, 43). The last enactment extends to matters and things possessed or used to forge instruments.

(*b*) Documents of title to lands are in indictments under the Larceny Act described as constituting or containing evidence of the title or part of the title of any person who has interest in the lands, and the lands or some part must be mentioned (24 & 25 Vict. c. 96, s. 28).

Immaterial variances between the contents of writings as stated and as proved in evidence can be amended. Where the legal effect of a document is uncertain, it is better to set it out according to its tenor, or verbatim, than to describe it according to its purport, varying the description in different counts.

Intent.—Where the existence of a particular intent or state of mind is an element in an offence, it must be stated. Thus "feloniously and of his malice aforethought" is essential in a murder indictment. "Feloniously" must appear in all indictments for felony, and "unlawfully" ought to appear in all indictments for misdemeanour. The old phrases "by force and arms," "or by the instigation of the devil," have disappeared, but there is still a whole category of vituperative adverbs usually inserted in indictments for common law offences, and necessarily inserted where they occur in the statutory definition of an offence, *e.g.* burglariously, wilfully, maliciously, corruptly, wickedly, and the like. Where an intent to injure, deceive, or defraud is an element of the offence, the person intended to be deceived or defrauded must be named unless a statute allows a statement and proof of a general intent. Such exceptions exist as to false pretences and falsification of accounts (24 & 25 Vict. c. 96, s. 88; 38 & 39 Vict. c. 24, s. 2), and as to forgery and uttering (24 & 25 Vict. c. 98, s. 44), and as to malicious damage (24 & 25 Vict. c. 97, s. 60)

Money and Valuable Securities.—Money or bank notes may be described simply as money, without specifying notes or coin; and in the case of embezzlement or fraudulent dealings with valuable securities, they may be described as money (14 & 15 Vict. c. 100, s. 18; 24 & 25 Vict. c. 96, s. 71).

Ownership.—In the case of offences against property it is usual, if not essential, to name the person whose property has been the subject of the offence charged. In indictments for larceny it is considered necessary to enumerate all the stolen goods if it is desired, on conviction, to obtain a restitution order under sec. 100 of the Larceny Act, 1861.

There appear to be only three express statutory exceptions: (*a*) as to property obtained by false pretences (24 & 25 Vict. c. 96, s. 88); (*b*) property fixed in a square, or street, or place dedicated to the public (24 & 25 Vict. c. 96, s. 31); (*c*) public records or public custody (24 & 25 Vict. c. 96, s. 30).

Rules as to the mode of describing property have been laid down in substantially the same terms as to offences punishable summarily (11 & 12 Vict. c. 43, s. 4) and on indictment (7 Geo. IV. c. 64).

Crown.—In charges of larceny, embezzlement, etc., by persons in the public service or police, property taken is described as the property of Her Majesty whether it is in her possession or power, or intrusted to the offender by virtue of his employment (24 & 25 Vict. c. 98, ss. 69, 70; 39 & 40 Vict. c. 36, s. 29). The property of convicted felons used to be described as belonging to the Crown, and apparently would still be so described where the felon was sentenced to penal servitude and no administrator had been appointed under the Forfeitures Act, 1870 (33 & 34 Vict. c. 23).

In charges for offences against the Post Office laws with respect to any property, it is described as "that of the Postmaster-General," whether the offence relates to property vested in him or merely intrusted to him for carriage or transmission (7 Will. IV. and 1 Vict. c. 36, s. 40; 3 & 4 Vict. c. 90, s. 66; 11 & 12 Vict. c. 88, s. 5; 31 & 32 Vict. c. 110, s. 21; 32 & 33 Vict. c. 73, s. 23).

Counties.—County property, including county bridges and buildings, used to be described as belonging to "the inhabitants" of the county, and since the creation of county councils all county property vested in them may be described as that of the county council of ———— (51 & 52 Vict. c. 41, s. 3). Since 1826, some buildings, such as prisons, then belonging to a county, have been transferred to the State (40 & 41 Vict. c. 21, s. 5).

Parishes.—Property provided for the use of a parish or its poor can be described as that of the overseers, without naming them (55 Geo. III. c. 137, s. 1). Most of such property is now vested either in the incorporated guardians of the poor (who are described as the guardians of the poor of the union of ———— or the parish of ———— (5 & 6 Will. IV. c. 69, s. 7)), or in the incorporated parish council (56 & 57 Vict. c. 73, ss. 5, 14) of a rural parish, or in rural parishes not having councils in the chairman of the parish meeting and the overseers of the parish (56 & 57 Vict. c. 73, s. 19). Materials, etc., provided for the repair of parish highways were described as the property of "the surveyor of highways" (7 Geo. IV. c. 64, s. 16). In many parishes the highways had passed to a highway authority (25 & 26 Vict. c. 51), and as a general rule incorporated district councils are now surveyors of highways (38 & 39 Vict. c. 55, s. 148; 56 & 57 Vict. c. 73, ss. 25, 82; and Pratt on *Highways*, 14th ed., 1897), except in the case of main roads, which are vested in county councils (51 & 52 Vict. c. 41, s. 11). Notwithstanding the local government changes, the provisions of 12 & 13 Vict. c. 103, s. 15, as to describing as belonging to "the inhabitants" moneys stolen or embezzled by collectors or assistant overseers under the poor-law, are treated as still in force (*R.* v. *Smallman*, [1897] 1 Q. B. 4).

Corporations.—The property of corporations is described as belonging to them by their corporate name, or in the case of a limited company (25 & 26 Vict. c. 89, s. 18), or an industrial and provident society, by its registered name (56 & 57 Vict. c. 39, s. 21).

Quasi-Corporations are described in the same way as joint owners where no statute otherwise provides: (*a*) Property under the view, cognisance, or management of commissioners of sewers is described as that of the commissioners, etc., without naming any of them (7 Geo. IV. c. 64, s. 18). (*b*) Turnpike trusts being extinct, the provision of 7 Geo. IV. c. 64, s. 17 has lapsed. (*c*) In the case of registered friendly societies and trade unions the property is described as that of the trustees, naming them, of the society for the time being in office (34 & 35 Vict. c. 31, s. 8; 59 & 60 Vict. c. 25, s. 87 (4) (*a*)). (*d*) As to literary and scientific institutions, see 17 & 18 Vict. c. 112, s. 20. (*e*) As to volunteer corps, see 25 & 26 Vict. c. 65, s. 25.

Joint Owners.—Property belonging to more than one person may be described as the property of A. B. and "another" *or* "others" (7 Geo. IV. c. 64, s. 14). This applies in the case of unregistered friendly societies or companies (*R.* v. *Frankland*, 1862, 32 L. J. M. C. 69; *R.* v. *Tankard*, [1894] 1 Q. B. 548). In the case of certain unincorporated banking copartnerships the property is described as that of one of the public officers of the bank (7 Geo. IV. c. 46, s. 9; 1 & 2 Vict. c. 96; 3 & 4 Vict. c. 111).

Individuals.—The property of an individual is described as the property of A. B., naming him. Since the recognition of the separate property of a married woman it is no longer necessary to describe it as her husband's in any case (see 45 & 46 Vict. c. 75, s. 12, which seems to supersede the common law and the provisions of 20 & 21 Vict. c. 85, ss. 21, 25).

Where tenants commit offences as to fixtures or furniture let with the house or lodging, the property, though technically in them, is described as that of the landlord (24 & 25 Vict. c. 96, s. 74; *R.* v. *Bolstead*, 1820, Russ. & R. 411).

The person to be described as owner in an indictment is the owner of the legal estate usually, as in the case of guardians, executors, or trustees; and in the case of a bailment, either the owner or the bailee by virtue of his special property (*R.* v. *Wilkinson*, 1821, R. & R. 470; *R.* v. *Remnant*, 1807, Russ. & Ry. 136). Where the property of a dead person is stolen before grant of probate or administration, the property is vested in the President of the Probate, Divorce, and Admiralty Division of the High Court of Justice (21 & 22 Vict. c. 95, s. 19).

Where the owner is a bankrupt, the property is laid in "the trustee of the property of A. B., a bankrupt" (46 & 47 Vict. c. 52, s. 83).

Variances between the ownership as stated and as proved, when not so serious as to affect the defence materially, may be amended (14 & 15 Vict. c. 100, s. 24).

Persons.—The defendant is described by his real name and surname, if known, or those by which he is usually known, or in case of doubt, with addition of the words "otherwise called" and any ALIAS; or when his name is unknown he may be described as "a person whose name to the jurors is unknown, but who is personally brought before them by the governor of the prison." In highway indictments at common law the defendants were described as the inhabitants of the parish of ————, or the men of the county of D. As to the proper defendants in such cases under the present law, see HIGHWAYS.

The same rules apply as to other persons named, *e.g.* the owner of stolen goods, or a person assaulted or killed (Plowden, ed. 1650, 75, 78), and the name or surname should be stated, if known. Where an infant has not acquired a name by baptism or reputation, it is described as "an infant, male or female, then lately born of the body of A. B., of tender age, to wit, the age of , and not named," or whose name to the jurors is unknown. If not known, "a person to jurors unknown" is inserted (Plowden).

It used to be necessary to state the additions of each person in their estate, or degree, or mystery, and the towns, hamlets, or places to which they belonged. But the Statute 1 Hen. V. c. 5, though not repealed as to criminal proceedings, is superseded by 7 Geo. IV. c. 64, s. 19, under which, if pleas of misnomer are proved, the indictment can be amended. And now (14 & 15 Vict. c. 100, s. 24) want or imperfection of the addition is immaterial, and the addition is not inserted except in the case of a peer (*R.* v. *Frost*, 1855, 24 L. J. M. C. 116); and description of a person by a name of office or other descriptive appellation, instead of by name or

surname, is perfectly sufficient (14 & 15 Vict. c. 100, s. 24); and in the case of the Postmaster-General, the official title only is used where the charge is for an offence against the Post Office laws.

Misnomer can be amended where the variance between the statement and proof is not material (14 & 15 Vict. c. 100, s. 1). There is a mass of old decisions on this subject in Archbold, 21st ed., 45–47, but no case since 1851.

Where the age of the person injured or the offender is an element in or an aggravation of the offence, it must be specified (see *R.* v. *Cox*, 1897, 14 T. L. R. 122).

Where a British subject commits an offence abroad triable in England, it is necessary to state his nationality in the indictment (see *R.* v. *Jameson*, [1896] 2 Q. B. 425; *R.* v. *Sawyer*, 1815, Russ. & R. 294).

Place.—It is no longer necessary to specify in the body of an indictment any place by way of special venue (14 & 15 Vict. c. 100, s. 23).

Where the place is part of the description of a written instrument, or is to be proved by matter of record, or is an essential ingredient of the offence, *e.g.* is criminal trespass to land, it should be accurately stated, as should the name of a parish, where the penalty on conviction goes to the poor of the parish (*e.g.* as to gaming-houses). But the variances between statement and proof, if not material, can be amended (11 & 12 Vict. c. 46, s. 4; 12 & 13 Vict. c. 45, s. 10; 14 & 15 Vict. c. 100, s. 24).

It is the practice in indictments at the Central Criminal Court to insert the parish in which the offence is supposed to have been committed. Local description is said to be essential in the following cases:—

(*a*) Sacrilege, burglary, house-breaking and stealing in a dwelling-house, or being found by night armed with intent to break into a dwelling-house (*R.* v. *Jarrald*, 1863, 32 L. J. M. C. 258; Archbold, 21st ed., 229).

(*b*) Arson of a dwelling-house, riotous demolition of churches, houses, etc., and malicious injuries to sea-banks. Forcible entry, and poaching. The gist of all these offences is wrongful injury to realty, or rights connected therewith.

(*c*) Nuisance to highways.

Except the decision above cited, all those on the subject are prior to 1851, and the power of amendment of variances between statement and proof, while not an excuse for inaccuracy, affords a *locus pœnitentiæ* for inaccurate pleaders.

Time.—A time (*i.e.* day, month, and year) is always stated in an indictment for the commission of an offence. When the offence is a continuing offence, such as nuisance, it is usual to say "on the day of A.D., and on divers days between that date and the taking of this indictment."

But exactitude in specifying the day is not essential, except where the offence is one which must be prosecuted within a given time from its commission (*R.* v. *Brown*, 1828, Moo. & M. 163; *R.* v. *Trehearne*, 1831, 1 Moo. C. C. 298) or in which time is of the essence of the offence (see FRAUDULENT DEBTOR); and an indictment, except in such cases, is not invalidated—

(*a*) By omission to state the time of the commission of the offence.

(*b*) By stating the time imperfectly.

(*c*) By specifying a time for the commission of the offence subsequent to the taking of the indictment, or on an impossible day (14 & 15 Vict. c. 100, s. 24).

(*d*) If the offence is proved to have been committed or prosecuted within the statutory period (*R.* v. *West*, 1897, 67 L. J. Q. B. 62).

In indictments for offences punishable only or more severely if com-

mitted at night, it is necessary to say in the nighttime, and usual, but not necessary, to specify the exact hour (Archb. *Cr. Pl.*, 21st ed., 56, 57, 229). It is also usual in referring to instruments or documents to state the date which they bear, or on which they were delivered, and to specify any time to be proved by matter of record.

Value or Price.—It is unnecessary to state the value of any article, or the amount of any damage, injury, or spoil, unless the value, etc., is an essential element in the offence (14 & 15 Vict. c. 100, s. 24), *e.g.* where the amount, etc., makes the difference between an offence being indictable or summarily punishable (see Archbold, 21st ed., 66, 67). In such a case enough of the property must be specified to make up the value essential to prove the charge (*R.* v. *Forsyth*).

Words.—Where words are the gist of an offence, as in libel, perjury, or false pretences, they must be set out, and where their known falsity must be proved the indictment must state in what respects they were known to be false. This rule is subject to exception in the case of offences by debtors (see FRAUDULENT DEBTORS), and of receiving property obtained by false pretences (see FALSE PRETENCES).

CONCLUSION.—An indictment if for a statutory offence concludes against the form of the statute (or statutes) in that case made and provided, and against the peace of our Sovereign Lady the Queen, her Crown and dignity. These formal conclusions are not now necessary (14 & 15 Vict. c. 100, s. 24), but are always inserted (*Castro* v. *R.*, 1883, 6 App. Cas. 229), and are often useful (see *R.* v. *Sawyer*, 1815, Russ. & R. 294). It is not usual to specify the statute or statutes by reference to its short or long title, probably owing to the risk of clerical error and attendant consequences under the old system of pleading (see Hardcastle on *Statutes*, 2nd ed., pp. 55–60).

Common law indictments conclude against the peace, etc., with or without a preliminary statement "to the evil example, etc."; or to "the common nuisance," and the like.

DEMURRERS, ETC.—Objections to the validity or sufficiency of an indictment are taken—

(1) By demurrer;

(2) By motion to quash the indictment;

(3) By motion to arrest judgment thereon.

(1) The first is seldom now used owing to the facility of amendment in the case of formal defects and the abolition of many useless forms (14 & 15 Vict. c. 100, s. 24), and because a decision on demurrer can be reviewed only by writ of error, and not by case reserved (see CROWN CASES RESERVED), and further because the defendant cannot plead and demur at the same time (*R.* v. *Duffy*, 1848, 7 St. Tri. N. S. 853), and because a demurrer admits the facts charged, and, if unsuccessful, makes the defendant liable to judgment, unless the Court in its discretion allows him to plead over (Steph. *Crim. Proc.* art. 258).

(2) Motion to quash the indictment is usually made by the defendant on arraignment and before pleading, but sometimes at a later stage (*R.* v. *Heane*, 1864, 33 L. J. M. C. 115), except where the defect challenged is formal only (14 & 15 Vict. c. 100, s. 25). It is used where the indictment—

(*a*) Discloses no offence known to the law (*R.* v. *Hall*, [1891] 1 Q. B. 747);

(*b*) Is too vague and general (*R.* v. *Stroulger*, 1886, 15 Q. B. D. 327);

(*c*) Is preferred before the wrong Court;

(*d*) Is preferred without compliance with the necessary preliminaries, *e.g.* under the Vexatious Indictments Act, 1859 (*R.* v. *Fuidge*, 1864, 33 L. J. M. C. 74; *R.* v. *Beckley*, 1887, 20 Q. B. D. 187; *R.* v. *Bradlaugh*, 1882, 15 Cox C. C. 156);

(*e*) Contains counts for more than one felony, or more than one misdemeanour, which cannot in fairness to the accused be tried together (*vide ante*).

Quashing the indictment is purely matter of discretion, and the Court may leave the defendant to demur or seek a writ of error. Where the Court refuses to quash, the defendant, if he desires to reserve all rights, refuses to plead so as to prevent the curing of any defect, and a plea of not guilty is entered for him by the Court.

The prosecution may move to quash a defective indictment when another bill for the same offence has been sent up and found (Archbold, 21st ed., 103–105).

(3) Motion in arrest of judgment is made after verdict and before sentence, on the ground of some defect in the indictment or record, which has not been amended during the trial, nor cured by the verdict, and which prevents entering any legal judgment (see 7 Geo. IV. c. 64, s. 21; Archbold, 21st ed., 72, 144, 217).

Rulings of the Court under 2. and 3. may be given subject to a special case for the consideration of the Court for CROWN CASES RESERVED.

PLEAS.—Pleading in bar or in abatement to an indictment is dealt with under ABATEMENT; AUTREFOIS ACQUIT; AUTREFOIS CONVICT; BAR, PLEA IN; and pleading in justification on libel is dealt with under JUSTIFICATION. The plea of not guilty is pleaded orally on arraignment, except on trial for misdemeanour in the High Court.

REPLICATIONS.—Except in the Queen's Bench Division, a replication is made orally, and only put into writing in making up the record. Formal defects in making up the record do not now affect the validity of the judgment.

PRECEDENTS.

Commencement.

First or only count.

The jurors for our Lady the Queen on their oath present that

Subsequent counts or averments.

The jurors aforesaid, on their oath aforesaid, do further present (or say) that.

Venue.

Central Criminal Court to wit. County of London to wit. City and County of Lichfield to wit. Kent to wit. County of Lancaster, Kirkdale Division, to wit, etc.

Conclusion.

(*a*) Against the form of the statute or statutes in that case made and provided; (*b*) and against the peace of our Sovereign Lady the Queen, her Crown and dignity.

Only the words from (*b*) are inserted where the offence is punishable only at common law.

Statement.

Arson.

A. B. on the day of A.D. 18 feloniously unlawfully and maliciously did set fire to certain matters and things to wit

then being in and under a certain building to wit a dwelling-house situate at and being No. in the parish of in the county of with intent thereby then unlawfully maliciously and feloniously to set fire to the said house and with intent thereby then to defraud and so the jurors aforesaid upon their oath aforesaid do further present that the said feloniously unlawfully and maliciously did set fire to the said matters and things so being as aforesaid in and under the said building under such circumstances that if the said building had been thereby set fire to the offence would have amounted to felony etc.

Assault.

A. B. on the day of A.D. 189 at the parish of in the county of in and upon one C. D. then being a peace officer to wit a constable and then being in the due execution of his duty as such constable unlawfully did make an assault and him the said so being in the execution of his duty as aforesaid did then beat wound and ill-treat and other wrong to the said then did to the great damage of the said etc.

A. B. on the said day of in the year aforesaid at the parish and in the county aforesaid unlawfully and maliciously did wound C. D. etc.

Bodily Harm—Second Count.

The said A. B. on the said day of in the year aforesaid at the parish and in the county aforesaid in and upon the said C. D. unlawfully did make an assault and him the said C. D. did then beat wound and ill-treat thereby then occasioning to the said C. D. actual bodily harm and other wrongs to the said C. D. then did to the great damage of the said C. D. etc.

(See 1 Steph. *Hist. Crim. Law*, p. 290.)

Betting House.

A. B. on the day of A.D. 189 at the parish of in the county of then being the occupier of a certain house called situate in the parish and county aforesaid unlawfully did use the said house for the purpose of betting with persons resorting thereto (the names of the said last-mentioned persons being to the jurors aforesaid unknown) to the common nuisance of all the liege subjects of our said Lady the Queen there inhabiting being and passing and against the peace of our said Lady the Queen her Crown and dignity

Burglary, or Housebreaking and Theft.

A. B. on the day of A.D. 18 [at about the hour of on the night of the said day] the dwelling-house of situate in the parish of in the county of and within the jurisdiction of the Central Criminal Court feloniously [and burglariously] did break and enter with intent the goods and chattels of the said C. D. in the said dwelling-house then being feloniously to steal take and carry away and then in the said dwelling-house [*enumerate the articles stolen*] of the value of of the goods and chattels of the said C. D. in said the dwelling-house then being feloniously did steal take and carry away

(See BURGLARY vol. ii. p. 309.)

Conspiracy.

A. B. C. D. and E. F. on the day of A.D. 189 and on divers days and times thereafter between the said day and at the parish of in the county of unlawfully fraudulently and deceitfully did conspire combine confederate and agree together by divers artful and subtle means stratagems and devices to obtain and acquire to themselves of and from G. H. divers monies of the said G. H. to a large amount to wit to the amount of and to cheat and defraud the said G. H. of the same

A. B. and C. D. on the day of A.D. 189 at the parish of in the county of and within the jurisdiction of the said Court and on divers other days thereafter and between that day and the day of A.D. 189 unlawfully did conspire combine confederate and agree together to obtain and acquire to themselves of and from E. F. by divers false pretences and unlawful and subtle means stratagems and devices the property of the said and to cheat and defraud the said E. F. thereof

[NOTE.—It is not necessary to set out the overt acts in an indictment for conspiracy (*R.* v. *O'Donnell*, 1848, 7 St. Tri. N. S.)]

Embezzlement.

A. B. on the day of A.D. 189 being then employed as clerk [and servant] to C. D. did then and whilst he was so employed as aforesaid receive and take into his possession certain monies to a large amount to wit to the amount of for and in the name and on the account of the said C. D. his master and the said money then fraudulently and feloniously did embezzle and so the jurors aforesaid upon their oath aforesaid do say that the said A. B. then and in manner and form aforesaid the said money the property of the said C. D. his master from the said C. D. his said master feloniously did steal take and carry away etc.

[NOTE.—Sometimes the counts are varied by putting "clerk" in one and "servant" in another, and so on.]

The said afterwards and within six calendar months from the time of committing of the said offence in the first count of this indictment charged and stated to wit on the day of in the year aforesaid being then employed as to the said did then and whilst he was so employed as last aforesaid receive and take into his possession certain other money to a large amount to wit to the amount of for and in the name and on the account of the said his said master and the said last-mentioned money then and within the said six calendar months fraudulently and feloniously did embezzle and so the jurors aforesaid upon their oath aforesaid do say that the said then in manner and form aforesaid the said money the property of the said his said master from the said his said master feloniously did steal take and carry away etc.

Falsification.

A. B. on the day of A.D. 189 being then *clerk* to one did then and whilst he was such clerk to the said as aforesaid unlawfully wilfully and with intent to defraud omit and concur in omitting a certain material particular from a certain book to wit

which said book then belonged to and was in the possession of the said his said employer to wit by omitting etc.

A. B. on the day of A.D. 189 being then clerk to C. D. did then and whilst he was such clerk to the said C. D. as aforesaid unlawfully wilfully and with intent to defraud make and concur in making a certain false entry in a certain book to wit [describe the book sufficiently for identification] which said book then belonged to and was in the possession of the said C. D. his employer to wit by falsely entering in such book under the date of a sum of as having been paid on that day to one E. F. whereas in truth and in fact [set out in which respects it is false] as he the said well knew at the time when he made such false entry as aforesaid and which said false entry was in words and figures following [set out the entry] etc.

Fraudulent Debtors.

(1) On the day of A.D. 18 a bankruptcy petition was presented by A. B. (or by C. D. against the said A. B.) and that the said A. B. was upon the day of A.D. 18 duly adjudged bankrupt upon the said petition and that the said within four months next before the presentation of the said petition to wit on the day of A.D. 18 in

the parish of in the county of and within the jurisdiction of the said Court unlawfully and fraudulently by divers false representations did obtain certain property on credit from the said to wit and has not paid for the same against the form etc. (32 & 33 Vict. c. 62, s. 11 (13))

(2) Heretofore and before the committing of the offence hereinafter mentioned to wit on the day of A.D. 189 a bankruptcy petition was presented against the said A. B. and that the said A. B. was thereupon to wit on the day of A.D. 189 adjudged bankrupt and that the said A. B. after the presentation of the said bankruptcy petition against him to wit on the day of unlawfully and with intent to defraud one C. D. his creditor did conceal a certain part of his property to the value of £10 and upwards that is to say [set out £10 worth of the property] (32 & 33 Vict. c. 62 s. 11 (4))

(3) A. B. on the day of A.D. in incurring a certain debt and liability to wit a debt of to one unlawfully did obtain credit to wit credit with one C. D. for the amount of the said debt by false pretences (*or* by fraud other than false pretences) etc. (32 & 33 Vict. c. 62, s. 13; (1) see *R.* v. *Jones*, [1898] 1 Q. B. 119)

(4) Heretofore and before the committing of the offence by hereinafter charged and stated to wit on the day of A.D. the said A. B. was adjudged bankrupt and that the said A. B. at the time of the committing of the said offence was an undischarged bankrupt and that the said afterwards to wit on the day of A.D. and on divers days and times thereafter and between that day and the day of A.D. in the parish of in the county of and within the jurisdiction of the said Court then being an undischarged bankrupt as aforesaid unlawfully did obtain from one credit to the extent of £20 and upwards to wit credit to the amount of without informing the said that the said was at the time when he did obtain such credit as aforesaid an undischarged bankrupt as aforesaid etc. [45 & 46 Vict. c. 52, s. 31; and see *R.* v. *Dyson*, [1894] 2 Q. B. 176)

(5) Heretofore and before the committing of the offence next hereinafter mentioned to wit on the day of A.D. 189 a bankruptcy petition was presented against the said A. B. and that the said was thereupon to wit on the day of adjudged bankrupt and that the said after the presentation of the said bankruptcy petition against him to wit on the day of unlawfully and fraudulently did remove a certain part of his property of the value of £10 and upwards to wit [set out at least £10 worth of the property] (32 & 33 Vict. c. 62, s. 11 (5))

(6) On the day of A.D. 18 A. B. was duly adjudged bankrupt and that the said A. B. afterwards to wit on the day of in the year aforesaid in the parish of and within the jurisdiction of the said Court unlawfully and with intent to defraud did make a material omission in a certain statement relating to his affairs that is to say a certain document dated as last aforesaid and entitled in the High Court of Justice in Bankruptcy *re* statement of affairs and signed by the said and bearing his declaration on oath that the said statement was a full and complete statement of his affairs by omitting to mention in the said statement a certain debt of the amount of then due by him the said to (32 & 33 Vict. c. 62, s. 11 (6))

Larceny by Clerk or Servant.

The said A. B. afterwards and within the space of six calendar months from the time of the committing of the offence in the first count of this indictment charged and stated to wit on the day of A.D. 189 was *servant* to C. D. and that the said A. B. whilst he was such servant to the said C. D. to wit on the day and in the year aforesaid of and belonging to the said C. D. master of the said A. B. feloniously did steal take and carry away etc.

Lunatic.

That A. B. on the day of A.D. 189 and on divers days and times thereafter between the said day and the day of in the year aforesaid unlawfully and contrary to the provisions of the Lunacy Acts 1890 and 1891 and without a reception order within the meaning of the 4th section of the said Lunacy Act 1890 and without the approval of the Commissioners in Lunacy did detain for payment [take charge of] [receive to board and lodge] a certain lunatic named C. D. not being a pauper or a lunatic so found by inquisition in an unlicensed house known as in the parish of and in the county of (53 & 54 Vict. c. 5, s. 315)

Previous Conviction.

Heretofore and before the commission of the felony hereinbefore charged to wit at [specify Court and place of trial] on the day of A.D. 189 the said A. B. was convicted of felony which said conviction is still in full force strength and effect and not in the least reversed annulled or made void etc.

Receiving (coupled with Larceny).

The said A. B. afterwards to wit on the day and year aforesaid the goods and chattels aforesaid before then feloniously stolen taken and carried away feloniously did receive and have he the said A. B. at the time when he so received the said goods and chattels as aforesaid then well knowing the same to have been feloniously stolen taken and carried away against the form etc. (24 & 25 Vict. c. 96, s. 92)

Threatening Letter.

A. B. on the day of A.D. 189 feloniously did send to one C. D. a certain letter directed to the said by the name and description demanding money from the said with menaces and without any reasonable and probable cause he the said then well knowing the contents of the said letter, and which said letter is as follows that is to say [*copy it out*] (24 & 25 Vict. c. 96, s. 44)

[*Authorities.*—Archbold, *Cr. Pl.*, 21st ed., *passim*; 1 Steph. *Hist. Crim. Law*, 273–295.]

Indifferent.—An "indifferent" person, as a judge or arbitrator, is one who has no interest in the subject-matter upon which he has to adjudicate (per Lord Coleridge, C.J., in *R.* v. *Commissioners of Sewers of Essex*, 1885, 14 Q. B. D. 578, 579). But see ARBITRATION; BIAS.

Indivisum — That which persons hold in common without partition.

Indorsement of Address.—See WRIT OF SUMMONS.

Indorsement of Claim.—See STATEMENT OF CLAIM.

Inducement.—Those introductory averments in a pleading alleged by way of previous explanation to the material facts are called "matters of inducement"; such are averments stating who the parties are, how connected, and other surrounding circumstances leading up to the matters in dispute. These introductory averments should be stated as concisely as possible (Odgers, *Principles of Pleading*, 3rd ed., p. 176).

Induction—The act of giving formal possession of an ecclesiastical living,—the investiture of the temporal part of the benefice as institution (*q.v.*) is of the spiritual. Induction takes place under a mandate directed by the bishop to the person empowered to induct, usually the archdeacon, who, or some deputy to whom he has issued his precept takes the hand of the person to be inducted and lays it upon the key, or upon the ring of the church door, or on some part of the church itself, and uses some such words as these: "By virtue of this mandate, I do induct you into the real, actual, and corporal possession of this church of C., with all the rights, profits, and appurtenances thereto belonging." After which the inductor opens the church door, and causes the person inducted to enter the church alone, who then usually tolls a bell as a public notification of the fact of his induction. This done, a certificate is made of the facts by the person inducting and the witnesses (Phillimore, *Eccl. Law*, 2nd ed., pp. 359, 360; Blunt, *Church Law*, 3rd ed., pp. 240–243). See PRESENTATION.

Industrial and Provident Societies.—The law on this subject is now consolidated in the Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), as amended in two small details by an Act of 1894 (57 & 58 Vict. c. 8). The Acts apply to all the British islands, except the Isle of Man (1893, s. 2).

Incorporated societies existing on 1st January 1894, which had been registered or certified under prior Acts as to industrial and provident societies, are treated as societies registered under the Act of 1893, and their rules continue in force until altered or rescinded, so far as they do not contravene any express provisions of that Act. Their powers of altering their rules and binding existing members by the alterations seem unaffected by the repeals or the Act of 1893 (cp. *Smith* v. *Galloway*, [1898] 1 Q. B. 71).

The societies which can be registered under the Acts are those formed for carrying on any industry, business, or trade (wholesale or retail) specified in or authorised by its rules, including dealings of every description with land, whether copyhold, freehold, or leasehold (1893, ss. 4, 79). The purpose of the society must not be illegal (1893, s. 9, (1) (*c*); see *Swaine* v. *Wilson*, 1890, 24 Q. B. D. 252; *Warburton* v. *Huddersfield Industrial Society*, [1892] 1 Q. B. 817).

To be entitled to registration the society must consist of at least seven members, and send to the Registrar of Friendly Societies an application signed by seven members and the secretary, and two printed copies of its rules (1893, s. 5 (1), (2)). A name (which must end with the word "limited") will not be registered which is likely to confuse the society with another, or to mislead the members or the public (s. 5 (3)). Change of name is allowed only by special resolution of the society, approved by the Chief Registrar (s. 52).

Where a society carries on business in more than one part of the United Kingdom, it is registered in the country where its registered office is, but lodges copies of rules with the registrar in each country where it does business (s. 5 (6)).

The registrar, if satisfied, issues an acknowledgment of registry, which is conclusive of the fact of registry (ss. 6, 8); but he can suspend or cancel registration (s. 9) in the following cases:—

(*a*) Reduction of membership below seven;

(*b*) Obtaining registry by fraud or mistake;

(*c*) Extinction of the society;

(*d*) Request of the society properly evidenced;

(*e*) Existence for an illegal purpose, or violation of the provisions of the Act wilfully and after notice from the registrar. In this case the Treasury must approve.

Appeals lie to the High Court from refusal to register or suspension or cancellation (1894, c. 30, s. 3; 1893, c. 39, s. 9 (4)).

Rules.—The rules must contain the provisions scheduled to the Act, and can be amended validly under the powers reserved in the rules if the amendments are registered as not contrary to the Act. They must provide for the appropriation of the profits. Anyone who asks for a copy is entitled to it on demand and payment of not over 1s. (s. 10).

Duties.—Every society must have a registered office with its name affixed, must submit its accounts annually to audit, and send the Registrar of Friendly Societies an annual return vouched by the auditors, and supply it on demand to members, and fix up a copy of its balance-sheet in the office (ss. 11–16, 20).

It must also submit its books to inspection by its members, and in certain events to inspection and report by a person appointed by the Chief Registrar of Friendly Societies (ss. 17, 18).

Privileges.—The society on registration becomes a body corporate with limited liability (s. 21). Persons over sixteen may be members (s. 32).

It is exempt from income tax under Schedules C, D, subject to certain limitations (s. 24); and members have power to transfer their interest by nomination on death (ss. 25, 26), and special provisions are made as to death duties on small shares (ss. 27, 28, and see DEATH DUTIES, vol. iv. p. 124) and property of lunatic members (s. 29). The society can also at its discretion distribute the property of intestate members (*Escritt* v. *Todmorden Co-operative Society*, [1896] 1 Q. B. 461). A register of members is kept (s. 34), and they are bound by the rules (s. 22), and suable in the County Court for debts due to the society (s. 23).

The contractual powers of the society are regulated by secs. 33, 35, but banking business is forbidden in the case of a society with withdrawable capital, and is subject to special regulations when allowed (s. 19).

Property and Funds.—Societies, subject to their rules, may hold land of any tenure, and make certain specified investments, including deposit in certified savings banks or post office savings banks, and lend to their members (ss. 36–42). Mortgages to the society are discharged by receipt indorsed (ss. 43–45). Debentures issued by a society secured on personal chattels appear to be bills of sale (*G. N. Rwy. Co.* v. *Coal Co-operative Society*, [1896] 1 Ch. 187).

Disputes with members or aggrieved and recent ex-members are settled by arbitration under the rules of the society or by reference to the Registrar of Friendly Societies, subject to an option to state a case for the High Court (s. 49).

Inspection of the books and affairs of a society may be ordered by the Chief Registrar (s. 50).

Amalgamation, etc.—Societies may be amalgamated with or transferred to other societies or converted into a company, or a company into a society, by special resolutions in the form prescribed by the Act and registered at the central office of friendly societies. Such amalgamations do not affect the rights of creditors (ss. 51–57).

Dissolution is provided for by secs. 58–61. These sections bring societies within the winding-up Acts (see *In re Ferndale Industrial Co-*

operative Society, [1894] 1 Q. B. 828), which was not the case under prior statutes (see *In re London and Suburban Bank Co.*, [1892] 1 Ch. 604).

Officers.—Officers in receipt or charge of money must, if required by the rules, give security for rendering a just and true account, and every servant of the society must on formal demand render proper accounts (ss. 47, 48).

Offences.—Secs. 62–70 deal with offences by the society in non-compliance with the requirements of the Act, and by officers guilty of fraud, misappropriation, or falsification. The fine, except in the last two cases, must not exceed £5. All offences are summarily punishable, subject to appeal to Quarter Sessions.

Government Powers.—The Treasury may appoint public auditors, determine their remuneration, and fix the fees and make regulations as to registry and procedure (ss. 72–74).

These powers have been exercised by the issue of regulations, forms, etc., on 1st January 1894 (St. R. & O., 1894, pp. 158–188). As to the limits of the Treasury's power, see *Wilmot* v. *Grace*, [1892] 1 Q. B. 812.

The working of the Act and the societies to which it has been applied are stated in the annual reports of the Registrar of Friendly Societies (see Parl. Pap. 1897, C. 94, pp. 61–66).

Industrial Assurance Company is defined in sec. 1 of the Collecting Societies and Industrial Assurance Companies Act, 1896 (60 & 61 Vict. c. 26), as "a person or body of persons, whether corporate or unincorporate, granting assurances on anyone's life for a less sum than £20." Companies of this kind, if registered under the Friendly Societies Act, 1896 (c. 25), are not subject to the provisions of the Life Assurance Companies Acts, 1870 and 1872 (33 & 34 Vict. c. 41, s. 2) (*Newbold Friendly Society* v. *Barlow*, [1893] 2 Q. B. 128).

An industrial assurance company which receives contributions or premiums by means of collectors at a greater distance than ten miles from its registered office or principal place of business and at less periodical intervals than two months, is within the Collecting Societies Act, 1896 (60 & 61 Vict. c. 26, ss. 1, 17).

The effect of this is as follows:—

(*a*) To prohibit the society from enforcing a forfeiture by a person assured for default in contributions unless they have served on him a notice in writing stating the amount due, and that if he does not pay within a reasonable time not less than fourteen days his interest or benefit will be forfeited, and default has been made in payment under the notice. This gets rid of *Taylor* v. *Collins*, 1882, 46 L. T. 168. The service is effected by delivery at his last known place of abode (1896, c. 26, ss. 3, 16);

(*b*) To prohibit transfer of a person assured without his written consent, or that of his parent or guardian, from one company to another, except on an amalgamation or transfer of business under the Life Assurance Companies Acts, 1870 to 1872, and to require the transferee company to give the transferor company written notice of an application for admission or transfer (1896, c. 26, s. 4; see Baden Fuller on *Friendly Societies*, p. 119);

(*c*) To require the company to hold a general meeting at least once a year properly advertised or served on each member (s. 5);

(*d*) To provide for the settlement by a County Court judge under the Friendly Societies Act, 1896, of any dispute between the company and a member or person insured or person claiming under either (s. 7; and see Fuller on *Friendly Societies*, p. 120);

(*e*) To prevent acting collectors of a company from being members of the committee of management or holding any office on the company, except superintending collectors within a given district, voting or taking part in the proceedings at any meeting of the company (ss. 8, 14).

All industrial assurance companies, unless registered as friendly societies, are subject to the Life Assurance Companies Acts, 1870 and 1872. See LIFE INSURANCE. Societies not so registered and collecting premiums at intervals greater than two months are not under the Collecting, etc., Societies Act, 1896, except where they assure the payment of money on the death of children under the age of ten years (1896, c. 25, ss. 1, 13), in which event they are subject to secs. 62–67 and 84 of the Friendly Societies Act, 1896, c. 25, as to such insurances (*Newbold Friendly Society* v. *Barlow*, [1893] 2 Q. B. 128). Such policies when issued by an industrial assurance company of whatever kind are not subject to the Life Assurance Act, 1774 (14 Geo. III. c. 48), a short title given by the Short Titles Act, 1896, but which is deceptive and misleading, as the Act extends to other events than life.

All these companies are within the Life Assurance Companies Act, 1896 (59 & 60 Vict. c. 8).

Industrial insurance companies, so far as within the Friendly Societies Act, 1896, and the Collecting Societies, etc., Act, 1896, are subject to provisions thereof as to offences and procedure (c. 25, ss. 84 (*f*), 85; c. 26, ss. 14, 15).

[*Authorities.*—Baden Fuller on *Friendly Societies*; Report of Registrars of Friendly Societies, 1896; Parl. Pap., 1897, C. 94.]

Industrial Exhibitions.—See EXHIBITIONS.

Industrial Property is a term of French origin which has been adopted in the official title of the Industrial Property Convention and Union for want of a better one. It comprises patents, trade marks, merchandise marks, trade names, designs, and models, and all such rights of prior user of industrial inventions or distinctive marks (see INDUSTRIAL PROPERTY CONVENTION; INTERNATIONAL UNIONS).

Industrial Property Convention—An international Convention, concluded 20th March 1883, for the protection of industrial property (*q.v.*). Provision is made in the Patents, Designs, and Trade Marks Act (46 & 47 Vict. c. 57, s. 107) for carrying out the provisions of the Convention in Great Britain. The chief articles of the Convention provide for—

(*a*) *Prior Right of Registration.*—Any person who has duly applied for letters patent or for registration of a design, model, or trade mark in one of the contracting States for registration in the other States enjoys a right of priority of six months for patents, and three months for designs, models, and trade marks, one month longer being allowed for countries beyond sea (art. iv.).

(*b*) *Registration of Marks in Country of Origin.*—Every trade mark duly (*régulièrement*) registered in the country of origin is admitted for registration, and protected *in the form originally registered* in all the other countries of the Union. The country of origin is that in which the applicant has his

chief seat of business. If this chief seat of business is not situated in one of the countries of the Union, the country to which the applicant belongs shall be deemed the country of origin (art. vi.).

(*c*) *Trade Names.*—A trade name is protected in all the countries of the Union without necessity of registration, whether it form part of a trade mark or not (art. viii.).

(*d*) *Stoppage of Goods bearing false Marks.*—Goods falsely bearing the name of any locality as place of origin, when this indication is associated with a fictitious trade name or one assumed with a fraudulent intention, may be seized on importation into those States of the Union where this mark or name has a right to legal protection.

Article v., which has given rise to much trouble and misunderstanding, especially in France, concerns—

(*e*) *Importation of Articles similar to those patented.*—It runs as follows: "The introduction by the patentee into the country where the patent has been granted of articles manufactured in any of the States of the Union shall not entail forfeiture of the patent (*déchéance*). Nevertheless the patentee shall remain bound to work (*exploiter*) his patent in conformity with the laws of the country into which he introduces the patented articles (*où il introduit les objets brévetés*)."

The French original stops, like the English official translation, at the word "forfeiture." This word, however, might imply forfeiture of the "articles" mentioned, whereas the sense of the word *déchéance* confines its application to the patent.

At the Madrid Conference (15th April 1891) an article was adopted under which it was left to each country to apply the word *exploiter* in the sense it chooses. The French Courts tend to define it in the sense of *fabriquer*, thus providing that the working shall be an industrial one, and not, as heretofore, one of a merely formal character (see Barclay, *The Law of France relating to Industrial Property*, London, 1889, and also *Monthly Circular*, No. 13 of the British Chamber of Commerce of Paris, June 1893).

Industrial School.—Certified Industrial and Reformatory (*q.v.*) Schools are institutions to which children are committed under the order of a magistrate. They are usually founded and maintained by committees of private persons, but in some cases by local authorities in pursuance of statutory powers hereinafter mentioned, and they are aided out of public moneys. Being concerned with the repression or prevention of crime, they are subject to the authority of the Home Office, and not to that of the Education Department. The term "industrial school" ordinarily denotes a certified boarding industrial school. The special class of certified day industrial schools will be treated separately at the end of this article.

Establishing of (Boarding) Industrial School.—An industrial school is described by the Industrial Schools Act, 1866, 29 & 30 Vict. c. 118, s. 5, as "a school in which industrial training is provided, and in which children are lodged, clothed, and fed, as well as taught." In order that children may be received under the Act, such a school must be "certified" by the Secretary of State, *i.e.* the Home Secretary, after examination by the Inspector of Reformatory and Industrial Schools (ss. 6, 7). Plans and particulars of buildings, and any subsequent alterations or additions thereto, must be submitted for the approval of the Secretary of State (ss. 11, 13). Every certified industrial school must be officially inspected not less than once a year (s. 10), and the Secretary of State, "if dissatisfied with the con-

dition of" the school, may withdraw the certificate after six months' notice (s. 44). The like notice is also required of the resignation of the certificate by the managers (s. 45).

Commitment to School.—Commitments to industrial schools may be made by a Court of summary jurisdiction. "In determining the school, the justices shall endeavour to ascertain the religious persuasion to which the child belongs, and shall, if possible, select a school conducted in accordance with such religious persuasion" (s. 18). Where a child is sent or about to be sent to a school not of his religious persuasion, the parent, step-parent, or guardian, or if none, the god-parent or nearest adult relative, may state to the justices making the order that he objects to the school selected, and may name another certified industrial school conducted in accordance with the child's religious persuasion, and signify his desire that the child should be removed thereto, and thereupon the justices shall, upon proof of the child's religious persuasion, comply with the applicant's request; provided (1) that the application be made before the child has been sent to a certified industrial school, or within thirty days of his arrival at such a school; and (2) that the applicant show to the satisfaction of the Court that the managers of the school named by him are willing to receive the child (s. 20). Religious interests are further safeguarded by the provision (s. 25) that a minister of the religious persuasion specified in the order of detention as that to which the child appears to the justices to belong, may visit the child at the school at times fixed by regulations to be made by the Secretary of State for purposes of religious instruction.

Classes of Children.—The following classes of children may be committed to industrial schools under the various Acts:—

I. Any child apparently under the age of fourteen brought by any person before two justices, and coming within any of the following descriptions:—

(*a*) That is found begging or receiving alms (whether actually or under the pretext of selling or offering for sale anything), or being in any street or public place for the purpose of so begging or receiving alms;

(*b*) That is found wandering and not having any home or settled place of abode, or proper guardianship, or visible means of subsistence;

(*c*) That is found destitute, either being an orphan or having a surviving parent who is undergoing penal servitude or imprisonment;

(*d*) That frequents the company of thieves;

(*e*) That is lodging, living, or residing with common or reputed prostitutes, or in a house resided in or frequented by prostitutes for the purpose of prostitution;

(*f*) That frequents the company of prostitutes (Industrial Schools Act, 1886, 29 & 30 Vict. c. 118, s. 14, as amended by the Industrial Schools Amendment Act, 1880, 43 & 44 Vict. c. 15).

II. Any children under the age of fourteen under the care or control of a woman convicted of crime against whom a previous conviction is proved, if such children have no visible means of subsistence, or are without proper guardianship; the order of detention to be made either by the Court by whom the woman is convicted, or by a Court of summary jurisdiction (Prevention of Crimes Act, 1871, 34 & 35 Vict. c. 112, s. 14).

III. Any child apparently under the age of twelve who is charged before a Court of summary jurisdiction with an offence punishable by imprisonment or a less punishment, but has not been convicted of felony (I. S. Act, 1866, s. 15).

IV. Any child apparently under fourteen, if his parent, step-parent, or

guardian represents that he is unable to control the child, and that he desires that the child be sent to an industrial school (I. S. Act, 1866, s. 16).

V. Any child apparently under the age of fourteen maintained in a workhouse or pauper school, if the guardians or board of management represent that the child is refractory, or is the child of parents either of whom has been convicted of a crime or offence punishable with penal servitude or imprisonment, and that it is desirable that he be sent to an industrial school (I. S. Act, 1866, s. 17).

VI. Children not complying with a school attendance order under the Elementary Education Act, 1876, 39 & 40 Vict. c. 79.

An attendance order may be made on the complaint of the local (school) authority if either (*ibid.* s. 11)—

(*a*) The parent of any child above the age of five who is under the Act prohibited from being taken into full-time employment (cp. *ibid.* s. 5), habitually and without reasonable excuse (cp. *ibid.* s. 11, *ad fin.*) neglects to provide efficient elementary instruction for his child; or

(*b*) Any child (between the ages of five and fourteen, *ibid.* s. 48) who is found habitually wandering or not under proper control, or in the company of rogues, vagabonds, disorderly persons, or reputed criminals.

Where an attendance order is not complied with without any reasonable excuse within the meaning of the Act, the Court may on the complaint of the local (school) authority (*ibid.* s. 12) in the first case of non-compliance, impose a penalty not exceeding with the costs 5s., or if the parent satisfies the Court that he has used all reasonable efforts, the Court may, without inflicting any penalty, order the child to be sent to a certified *day* industrial school, or if it appears to the Court that there is no such school suitable for the child, then to a certified industrial school. In the second case of non-compliance, the Court may inflict the like penalty, or order the child to be sent to an industrial school, as above, or do both. See also EDUCATION.

It is further provided by sec. 13 of the El. Ed. Act, 1876, that where the local (school) authority are informed of any child who is liable to be dealt with under that Act or the Industrial Schools Act, 1866, it shall be the duty of the local (school) authority to take proceedings accordingly, unless they think that it is inexpedient to do so.

Period of Detention and Licensing.—The period of detention must in all cases be specified in the order, and must not in any case extend beyond the time when the child will attain the age of sixteen (I. S. Act, 1866, 29 & 30 Vict. c. 118, s. 18). The managers of the school have power in every case after eighteen months to grant a licence to the child to reside with some trustworthy and respectable person (s. 27); and when the order of detention is made at the instance of the school authority, the licence may be granted after one month, subject to the condition that the child attend as a day scholar some certified efficient school (El. Ed. Act, 1876, 39 & 40 Vict. c. 79, s. 14). Under the I. S. Act Amendment Act, 1894, 57 & 58 Vict. c. 33, every child sent to an industrial school after the passing of the Act remains under the supervision of the managers up to the age of eighteen (s. 1). The managers may license any child under their supervision, and may revoke the licence and recall the child to the school, but must notify the Secretary of State of any such recall, stating the reasons for it, and place the child out again within three months at latest (*ibid.*). A child detained in an industrial school at the passing of this Act may consent to come under its provisions (s. 3). The Reformatory and Industrial

Schools Act, 1891, 54 & 55 Vict. c. 23, gives power to the managers to apprentice or dispose of any child in any trade, etc., before the expiration of his period of detention; provided that if the child is disposed of by emigration, and in any case unless he has been detained for twelve months, the consent of the Secretary of State is required.

The Prevention of Cruelty to Children Act, 1894, 57 & 58 Vict. c. 41, enables a child to be committed to the custody of a relation or person named by the Court instead of being sent to an industrial school (*ibid.* s. 9).

Finance.—The cost of maintenance is met as follows:—

A. *Contribution by Treasury.*—The Treasury may contribute to the maintenance of children detained in certified industrial schools such sums as the Secretary of State from time to time thinks fit to recommend; provided that such contributions shall not exceed 2s. per head per week for children detained on the application of their parents, etc. (Class IV., *supra*; I. S. Act, 1866, s. 35). The following tariff of weekly payments has been fixed:—

Classes I., II., III., *supra*—

(*a*) For children under six, *nil*; (*b*) for children between six and ten, 3s.; (*c*) for children over ten,—if the school has been established before the 1st March 1872, 5s.; if after that date, 3s. 6d.; subject in either case to a reduction to 3s. where the child has been detained four years, and has reached fifteen years of age. Special arrangements are made for increase of grant in the case of training ships, and for reduction where a child goes out to work in the vicinity of the school.

Class IV., 2s.

Class V., *nil.*

Class VI.: subdivision (*a*), 2s.; subdivision (*b*), as for Classes I.–III.

B. *Contribution by Parents.*—The parent, etc., of every child detained in an industrial school is required to contribute, if of sufficient ability, not exceeding 5s. a week to the child's maintenance. The sum is fixed according to the parent's ability by the justices, collected by the inspector's agents, and paid to the Treasury in relief of the Treasury contribution, the balance, if any (which is exceptional), being handed over to the managers.

C. *Contribution by Guardians.*—In the case of Class V., *i.e.* children committed on the application of the guardians under the I. S. Act, 1866, s. 17, but not in other cases, the guardians may, with the consent of the Local Government Board, contribute such sums as they think fit. In practice this contribution is usually 5s. a week, equivalent to the whole cost of maintenance.

D. *Contributions by Local Authorities generally.* — (*a*) The [late] prison authority (see Prisons Act, 1865, 28 & 29 Vict. c. 126, s. 5) and (*b*) the School Board respectively have power to contribute towards the support of any certified industrial school under the I. S. Act, 1866, s. 12, and El. Ed. Act, 1870, 33 & 34 Vict. c. 75, s. 27. As to the case of a borough, however, where there is a School Board, see *post.* (*c*) A School Attendance Committee (El. Ed. Act, 1876, s. 7; cp. article EDUCATION) has not of itself any power of contributing to the maintenance of an industrial school, but under the El. Ed. (Industrial Schools) Act, 1879, 42 & 43 Vict. c. 48, s. 4, where a child is committed on the complaint of a School Attendance Committee (Class VI., *supra*), the council, guardians, or sanitary authority appointing such committee may contribute on the recommendation of the committee as if they were a School Board, subject, however, in the case of guardians, to the consent of the Local Government

Board, as under the El. Ed. Act, 1876, s. 31. Contributions from local authorities are thus in all cases optional and indeterminate and uncertain.

E. The residue (if any) of the cost of maintenance falls upon the *Managers*, whose reception of a child is deemed to be an undertaking to train, clothe, lodge, and feed him during the whole period of his detention (I. S. Act, 1866, s. 18).

A prison authority has also power to contribute towards the ultimate disposal of any inmate of a certified industrial school (Reformatory and Industrial Schools Act Amendment Act, 1872, 35 & 36 Vict. c. 21, s. 9). And in regard to expenditure on permanent works—

(*a*) A prison authority has power, with the consent of the Secretary of State, to contribute to the alteration, enlargement, rebuilding, establishment, or building of a certified industrial school, actual or intended, or to the purchase of land therefor (I. S. Act, 1866, s. 12). And by the Reformatory and Industrial Schools Act Amendment Act, 1872, s. 7, a prison authority is authorised to undertake anything to which it may contribute.

(*b*) A School Board has the same power of contributing as is given by sec. 12 of the I. S. Act, 1866, to a prison authority (El. Ed. Act, 1870, s. 27). Under the El. Ed. Act, 1870, s. 28, as amended by the El. Ed. Act, 1876, s. 15, a School Board has power, with the consent of the Secretary of State, to establish, build, and maintain a certified industrial school, and for that purpose the School Board has the same powers as for providing sufficient school accommodation for its district (cp. El. Ed. Act, 1870, ss. 19–21). And under the El. Ed. (Ind. Schools) Act, 1879, 42 & 43 Vict. c. 48, s. 2, a School Board has power to undertake anything to which it is authorised to contribute.

In the case of boroughs, under the El. Ed. Act, 1870, s. 27, as amended by the Reformatory and Industrial Schools Amendment Act, 1872, s. 8, on the School Board resolving to "contribute" or to "maintain," the prison authority, *i.e.* the council, are to cease to have the power to "contribute" or to "undertake."

As to borrowing powers of prison authorities and School Boards in relation to industrial schools, see Prisons Authorities Act, 1874, 37 & 38 Vict. c. 47; El. Ed. Act, 1873, 36 & 37 Vict. c. 86, s. 10; El. Ed. Act, 1876, 39 & 40 Vict. c. 79, s. 15; El. Ed. (Ind. Schools) Act, 1879, 42 & 43 Vict. c. 48, s. 3.

Day Industrial Schools.—Day industrial schools were instituted by the El. Ed. Act, 1876, s. 16. They are schools in which industrial training, elementary education, and one or more meals a day, but not lodging, are provided for the children, and they may be certified by the Secretary of State in like manner as under the Industrial Schools Act, 1866 (*ibid.*). The prison authority and the School Board have the same powers in relation to a certified day industrial school as to a certified industrial school (*ibid.* s. 16 (1)). As a matter of fact, nearly all the certified day industrial schools of the country are under School Boards. The following classes of children may be sent to certified day industrial schools:—

A. Children who might under the Industrial Schools Act, 1866, be sent to a certified (boarding) industrial school (El. Ed. Act, 1876, s. 16; cp. Class I., *supra*).

B. Children sent for breach of attendance order (El. Ed. Act, 1876, s. 12; cp. Class VI., *supra*).

C. Children attending in pursuance of an attendance order, and upon a joint request to the managers from the local (school) authority and the

parent, together with an undertaking by the latter to pay a required contribution (see *post*) (El. Ed. Act, 1876, s. 16 (4)).

D. Children attending not in pursuance of any attendance order, but upon the same joint request and undertaking as for Class C. This will include the case of children attending a certified day industrial school as a certified efficient school under the El. Ed. Act, 1876, s. 16, in pursuance of a licence from the managers of a certified industrial school under sec. 14. But if the conditions as to request and parent's contribution are not complied with in the case of any child, no grant (see *post*) can be made by the Secretary of State in respect of that child (*ibid.* s. 16 (4)).

With reference to the period of detention in certified day industrial schools, the following regulations are contained in an Order in Council made the 20th March 1877 in pursuance of sec. 16 of the El. Ed. Act, 1876:—

Classes A, B. Period of detention not to extend beyond three years, or after the child has reached the age of fourteen (Order in Council, par. 18). The period of detention must in all cases be specified in the order.

Class C. When the order is made, the child must be between five and fourteen (cp. El. Ed. Act, 1876, s. 48); and the order must not be in force more than one year, or after the child is fourteen (Order in Council, par. 19).

Class D. No compulsory detention.

In all cases of detention in a certified day industrial school, there is power to license after one month (El. Ed. Act, 1876, s. 14).

The expense of maintenance is met as follows:—

(1) *Contribution by the Treasury*—

Classes A, B. Such sum, not exceeding 1s. per head per week, and to be paid on such conditions, as the Secretary of State recommends (El. Ed. Act, 1876, s. 16 (2)). These conditions must provide for the examination of the children according to the standards of proficiency for the time being in force for the purposes of a parliamentary grant to public elementary schools; but may vary the amounts of the contributions to be made in respect of such standards respectively (*ibid.* s. 17).

Classes C, D. Such sum, not exceeding 6d. per head per week, and on such conditions (subject as before) as the Secretary for State recommends (El. Ed. Act, 1876, s. 16 (4)).

(2) *Contribution by Parent*—

Classes A, B. Such sum, not exceeding 2s. per week, as is named in the order of detention. It is the duty of the local school authority (School Board or School Attendance Committee) to obtain and enforce the order; and the sums received thereunder are paid to the local (school) authority in aid of their expenses under the Act. If the parent is unable to pay the sum ordered, the guardians are to give him sufficient relief to enable him to pay the same, or so much thereof as they consider him unable to pay (El. Ed. Act, 1876, s. 16 (3)).

Classes C, D. Such sum, not less than 1s. a week, as the Secretary of State from time to time fixes (El. Ed. Act, 1876, s. 16 (4)). The sum fixed by the Secretary of State is such sum as may be agreed upon between the parent and the managers, being not less than 1s. nor more than 2s. The sum is payable to the managers; it is not stated by whom it is to be collected.

(3) *Contributions by Local Authorities.*—These are as in the case of boarding industrial schools. The residue will fall upon the managers, but their liability is suspended during any week with respect to which the parent's contribution has not been paid in advance.

[*Authorities.* — Report (vol. i.) of the Departmental Committee on Reformatory and Industrial Schools, 1896, esp. Appendix III.; Annual Reports of the Inspector of Reformatory and Industrial Schools; Hornby's *Reformatory and Industrial Schools Acts*, 1897.]

Industriam, per.—A person is said to have in animals *feræ naturæ* a qualified property *per industriam* when he has reclaimed and tamed them by art, industry, and education, or has confined them within his own immediate power, so that they cannot escape and use their natural liberty. Thus, such a qualified property may subsist in deer in a park, hares or rabbits in an inclosed warren, hawks that are fed and under the control of their master, etc. If at any time such animals regain their natural liberty, the property in them ceases unless they have *animum revertendi*, which can only be known by their usual custom of returning (2 Black. *Com.* 391–393).

Inebriates Acts.—*Object.*—The object of these statutes, which came into law in 1879 (42 & 43 Vict. c. 19) and 1888 (51 & 52 Vict. c. 19) respectively, was to provide for the *voluntary* committal of "habitual drunkards"—a term which will be defined immediately—to licensed "retreats," and for their detention, care, and treatment there.

History.—An admirable summary of the history of inebriate legislation by Mr. J. G. Legge, Secretary to the Departmental Commission appointed in 1892 to inquire into the best mode of dealing with habitual drunkards, will be found printed in an appendix to the evidence taken by that Commission, C. 7008, i. 1893, p. 92, App. vi. See also Wood Renton on *Lunacy*, pp. 946–952. Here it must suffice to state that the first of the above-mentioned statutes was called on its enactment the Habitual Drunkards Act, 1879; but that the second (which made the Act of 1879 permanent) in deference to a supposed objection by patients to the title "Habitual Drunkard" changed the name to "Inebriates Act," and provided that both statutes might thenceforward be cited as the Inebriates Acts, 1879 and 1888.

Establishment of Retreats.—"Local authorities"—a term which (see Act of 1879, First Sched. Part I.) means for *England* (*a*) in a borough or city corporate having a separate Court of Quarter Sessions, the justices for the borough or city in special sessions assembled; (*b*) elsewhere, the justices for the county, riding, or other place, in general or Quarter Sessions assembled—are empowered to grant and may from time to time revoke or renew licences for retreats to any person or to two or more persons jointly for any period not exceeding thirteen months. For form of application, see 1879, Second Sched. Form 1; for form of licence, see *ibid.* Form 2. One at least of the licensees must reside at the retreat and be responsible for its management. A duly-qualified medical man is to be employed as medical attendant, unless the licensee, having his name on the medical register, acts as such (1879, s. 6). A person licensed to keep a house for the reception of lunatics (see article ASYLUMS, vol. i. at p. 385) may receive a licence (1879, s. 7). If the licensee becomes incapable, the local authority may by writing indorsed upon the licence transfer it to another person (1879, s. 8). Subject to the approval of the local authority, the licensee may appoint a deputy; no such appointment, however, shall authorise the deputy to act during any period or periods exceeding in all six weeks in any

one year (1888, s. 3). Every licence is subject to a duty, and is impressed with a stamp of £5, and 10s. for every patient above ten in number whom it is intended to admit into the retreat; and every renewal of a licence is to be impressed with a stamp of the same amount. These sums are STAMP DUTIES, and all the statutory law with reference to such duties is *mutatis mutandis* applicable to them. The expenses of the local authority in connection with the grant, renewal, or transfer of licences are to be borne by the applicant, and all fees for licences or searches, if any, are to be paid over to the clerk for the local authority (1879, s. 14). Twelve retreats were licensed in 1896, as against ten in 1895, and two new retreats were opened during the first half of 1897 (17th Report of Inspector of Retreats, 1897, C. 8563, p. 11).

Committal of Habitual Drunkards.—For the purposes of the Inebriates Acts, an habitual drunkard is "a person who, *not being amenable to any jurisdiction in lunacy*, is notwithstanding, by reason of habitual intemperate *drinking of intoxicating liquor* at times dangerous to himself or herself or others, or *incapable of managing* himself or herself and his or her affairs" (1879, s. 3 (*b*)). The words placed in italics in this definition require a brief notice. An inebriate may be *amenable* to the *jurisdiction in lunacy* if his inebriety produces such a degree of mental infirmity as to make him, as a fairly constant condition, incapable of managing himself or his affairs, within the meaning of sec. 116, subsec. 1 (*d*) of the Lunacy Act, 1890 (see article LUNACY, *post*, vol. viii.). Possibly also, as the definition speaks of *any*, and not merely *the, jurisdiction in lunacy*, the power of justices under sec. 2 of the Criminal Lunatics Act, 1838 (see vol. i. at p. 393), to deal with deranged persons proposing to commit crime might be held to come within the definition. Doubts have been expressed as to the scope of the words *intoxicating liquor*. It is tolerably clear from the use of the words "drinking of" that the eating or smoking of opium, or the hypodermic injection of morphia, would not come within the definition; and it is conceived that "intoxicating liquor" would be restricted—if this question came to be determined judicially—to recognised and commonly used intoxicants. One case of excessive tea-drinking has been treated under the Acts (Committee of 1891; *Answers* 894–897). As to the meaning of *incapable of managing*, etc., see LUNACY, *post*, vol. viii. Any habitual drunkard satisfying the above definition may obtain admission to a retreat on a written application (see 1879, Second Sched. Form 3) to the licensee, stating the time (the maximum period is twelve months) that the applicant undertakes to remain in the retreat, accompanied by the statutory declaration of two persons that the applicant is an habitual drunkard, and having its signature attested by two justices of the peace, who have satisfied themselves as to the facts, and who are required to state in part of the attestation that the applicant understood the nature and effect of his application (1879, s. 10). Once committed to a retreat, the patient cannot leave before the expiration of the term specified in his application, unless in accordance with the provisions as to leave of absence or discharge mentioned below (*ibid.*).

Provisions as to Inspection, Leave of Absence, Discharge, etc.—An Inspector of Retreats, appointed by the Home Secretary, and holding office during the Home Secretary's pleasure (1879, s. 13), is required to *inspect* every retreat at least twice a year (1879, s. 15), and to make an annual return to the Home Secretary, which, with the rules made by the Home Secretary for the management of retreats appended to it, is laid before Parliament (1879, s. 16). A printed copy of rules purporting to be the rules of a retreat, and signed by the Inspector of Retreats, is evidence of

such rules (1879, s. 17). The rules now in force were made on 10th August 1888. They deal in the main with details of management, which cannot be entered into here. But the following points are of practical importance. When a patient is found to be or becomes insane, the licensee is to give immediate notice by registered letter to (*a*) the Inspector, (*b*) the person by whom the last payment for the patient was made, (*c*) one of the signatories of the statutory declaration (*supra*), and (*d*) the relieving officer of the union or parish in which the retreat is situate (r. 5). A patient may not (*a*) without written permission from the licensee enter any public-house or other house where intoxicating liquors are sold (r. 9), or (*b*) without special written authority from the medical attendant take any intoxicating liquor, or sedative, narcotic, or stimulant drug or preparation (r. 10). "Regulations and orders" not inconsistent with these rules are to be prepared by the licensee within a month after the granting of the licence, and submitted to the Inspector for approval (r. 13). There are similar rules to those prescribed under the Lunacy Acts (see ASYLUMS, *passim*) as to books (r. 2), notices (r. 3, and see 1879, ss. 11 (reception), 27 (death)), separation of sexes (r. 6), visits of friends (r. 7), patients' letters (r. 8); and the Act of 1879 contains provisions, similar to those of the Lunacy Acts, as to offences (*a*) by licensees, any failure to comply with or contravention of the provisions of the Act (s. 23); (*b*) by any person ill-treating, etc., patient, inducing or helping him to escape, or unlawfully supplying him with intoxicating liquor (1879, s. 24); (*c*) by any habitual drunkard wilfully neglecting or refusing to comply with the rules (1879, s. 25). Penalties for (*a*) and (*b*), £20 maximum, or three months' imprisonment, with or without hard labour (s. 28); for (*c*), £5 maximum, or imprisonment for seven days, the period of imprisonment being excluded in computation of time of detention (1879, s. 25). Proceedings are taken under the Summary Jurisdiction Acts (s. 29); as to appeals, see 1879, s. 30, and vol. i. at p. 280. Sec. 31 of the Act of 1879 prescribes a two years' limitation for actions. But, *semble*, that section is now superseded by the Public Authorities Protection Act, 1893, 56 & 57 Vict. c. 61, s. 1. An habitual drunkard may be released from a retreat by a justice's licence on leave of absence—two months in first instance, but renewable from time to time—to live with any trustworthy and respectable person named in the licence (1879, s. 19). Such absence is to be reckoned in the computation of the time of his detention (s. 20). If he escapes from such person, or refuses to be restrained from intoxicating liquors, he *ipso facto* forfeits his leave and his right as regards computation of time (1879, s. 21), and may be taken back to the retreat (s. 21, and see also sec. 22 as to revocation of leave by Home Secretary or justice) as on an escape from the retreat. The formalities prescribed in cases of escape are (see 1879, s. 26), a sworn information by the licensee, and the issue of a *warrant* by a justice having jurisdiction in the place or district where the habitual drunkard is. Patients may *be discharged* by order of a justice (1879, s. 12), by the Home Secretary on the recommendation of the Inspector (s. 15), by High Court judge, or a County Court judge (within whose district the retreat is situated), after report by person appointed by him to inquire into the case (s. 18).

The time of detention in a retreat is excluded from the computation of the time specified in 9 & 10 Vict. c. 66, s. 1, by which no person is to be removed from a parish in which he or she has resided for five or six years (1879, s. 32); and persons holding their estates (being other than ecclesiastical benefices, as to which, see sec. 2 of the Clergy Discipline

Act, 1892 (55 & 56 Vict. c. 32)) subject to any condition of residence do not incur any forfeiture through being detained in a retreat (1879, s. 33). A bill for the amendment of the Inebriates Acts was introduced into Parliament in 1894, and further legislation on the subject is pending.

[*Authorities.*—In addition to the authorities mentioned in the article, see the *Annual Reports of the Inspector of Retreats.*]

In esse—In being, as opposed to *in posse*, which signifies a thing that is not but may be. A child *en ventre sa mère* (*q.v.*) is a thing *in posse*, but in law is considered as *in esse* for all purposes which are for his benefit (*Doe* v. *Clarke*, 1795, 2 Black. H. 399).

Inevitable Accident.—In *The Virgil*, 1843, 2 Rob. W. 201, Dr. Lushington, discussing the meaning of this term in connection with a collision at sea, said (p. 205): "In my apprehension, an inevitable accident in point of law is this, namely, that which the party charged with the offence could not possibly prevent by the exercise of ordinary care, caution, and maritime skill." This definition was approved by the Privy Council in *The Marpesia*, 1872, L. R. 4 P. C. 212; by Fry, L.J., in *The Merchant Prince*, [1892] Prob. 190, and by the same judge and Lopes, L.J., in *The Schwan*, [1892] Prob. 432, 434. In the last-mentioned case, Lopes, L.J., added that there is no distinction as regards inevitable accident between cases which occur on land and those which occur at sea.

The plea of inevitable accident is a good defence to actions for negligence and trespass, but if relied on it must be specially pleaded (*Winchilsea* v. *Beckly*, 1886, 2 T. L. R. 300).

Inexpedient.—Sec. 25, subsec. 1 of the Trustee Act, 1893 (reproducing sec. 32 of the Trustee Act, 1850), empowers the High Court whenever it is expedient to appoint a new trustee or new trustees, and it is found inexpedient, difficult, or impracticable so to do without the assistance of the Court, to make an order appointing a new trustee or new trustees. In *In re Somerset*, 1887, 31 Sol. J. 559, an order was made by North, J., under this section in an application by the wife and the other persons beneficially entitled under a marriage settlement, which contained a power of appointing new trustees exercisable by the husband and wife during their joint lives, where the husband, against whom the wife had obtained a decree of judicial separation, had gone to reside in Australia (see also *In re Bignold*, 1872, L. R. 7 Ch. 223; and *In re Lemann*, 1883, 22 Ch. D. 633).

Infamous Conduct.—Medical practitioners are liable to be struck off the register for conduct which is infamous in a professional sense. See MEDICAL PRACTITIONER.

Infamous Crimes are defined in sec. 46 of the Larceny Act, 1861 (24 & 25 Vict. c. 96), with reference to blackmailing (see ABOMINABLE CRIME, 5., vol. i. p. 28; MENACES). Conviction of such a crime appears to disqualify permanently for jury service unless a free pardon is obtained (33 & 34 Vict. c. 77, s. 10). No crimes now involve in England what are in

French law called *peines infamantes*. Convictions of treason or felony, if followed by sentence of death or penal servitude, involve disqualification (1) to hold any military, naval, or civil office under the Crown, or other public employment or any ecclesiastical benefice, or any place, office, or emolument in any university, college, or corporation; (2) to receive any pension or superannuation allowance payable by the public or out of any public fund. This disqualification may be removed by pardon within two months of conviction or before the office vacated is filled up; but if pardon is not obtained, continues until the sentence has been served, and extends also to deprivation of right to sit in Parliament or to exercise any parliamentary or municipal franchise (33 & 34 Vict. c. 23, s. 3) or to act as a juror (33 & 34 Vict. c. 77, s. 10). All these disqualifications but the last are removed by serving the sentence. The disqualification as to juries can apparently be got rid of only by a free pardon. But it is well to observe that service of a sentence of penal servitude is equivalent to free pardon (9 Geo. IV. c. 32, s. 3).

Persons convicted of felony are disqualified to act as constables (5 & 6 Vict. c. 109, s. 7), or to hold licences for the sale of intoxicants (3 & 4 Vict. c. 61, s. 7; 33 & 34 Vict. c. 29, s. 14; 23 & 24 Vict. c. 27, s. 22; *Hay* v. *Tower Justices*, 1890, 24 Q. B. D. 561), or to be paid officers of a poor-law authority. The last disqualification extends to convictions of fraud. See POOR LAW. And persons convicted of felony or misdemeanour are struck off the roll or register of APOTHECARIES, DENTISTS, MEDICAL PRACTITIONERS, SOLICITORS, and VETERINARY SURGEONS.

Conviction of any crime, followed by sentence of imprisonment without the option of a fine or penal servitude, disqualifies the offender for five years (unless he gets a free pardon) from being elected or serving as a member or chairman of a Parish Council or of a District Council or Board of Guardians (56 & 57 Vict. c. 73, s. 46).

As to *infamia* in Roman public and private law, see Greenidge's *Infamia*, 1894.

Infamy.—Under the old law a person whose character was infamous in consequence of conviction of some crime was deemed incompetent to give evidence in any legal proceeding. To show the incompetency on this ground it was necessary to prove both a conviction and a judgment following thereon, for the conviction might have been quashed on motion in arrest of judgment. This cause of incompetency was removed by endurance of punishment (9 Geo. IV. c. 32, s. 3), or by pardon, or by reversal of judgment; and was entirely abolished by 6 & 7 Vict. c. 85.

Infancy.—See INFANTS.

Infanticide is murder or manslaughter according to the presence or absence of deliberation (see HOMICIDE). But the accused may be convicted of concealment of birth (see BIRTH, CONCEALMENT OF). As to cruelty causing the death of children, see CRUELTY *to Children*. As to precautions against the neglect or killing of nurse children, see BABY FARMING. The Act there considered has been repealed as from 31st December 1897 and re-enacted with amendments by the Infant Life Protection Act, 1897 (60 & 61 Vict. c. 57).

Precautions against the risk of infanticide through insurance of children with friendly societies are provided by the Friendly Societies Act, 1896 (59 & 60 Vict. c. 25, ss. 62–67), the Collecting Societies, etc., Act, 1896 (59 & 60 Vict. c. 26, s. 13), in cases where the assured has not an insurable interest, as defined by the cases under 14 Geo. III. c. 78, in the life of insured child.

Infant Life Protection.—The law on this subject as it stood until the end of 1897 has been dealt with under BABY FARMING (vol. i. p. 442). The Infant Life Protection Act, 1872, there dealt with has been repealed and superseded by the Infant Life Protection Act, 1897 (60 & 61 Vict. c. 57), which came into force on 1st January 1898 (s. 19). It gets rid of the system of registration, and substitutes one of notice to the supervisory authority.

Duties of Recipients of Children for Gain.—Persons who for hire or reward retain or receive more than one child under *five* years of age (of which they are not relatives or guardians) for the purpose of nursing or maintenance apart from its parents for a longer period than *forty-eight* hours, must within the forty-eight hours post or deliver to the local authority a written notice of the fact, stating the name, age, and sex of the infants, the name of the receiver and the dwelling where the infants are kept, and the name and address of the person from whom the infants were received (ss. 2 (1) (2), 13). They must also give written notice when and by whom a child specified in a notice has been removed from their care (ss 2 (3), 13, 14). Where any person receives an infant under the age of two for a sum not exceeding £20, paid down without any agreement for future payment, he must within forty-eight hours post or deliver written notice of the fact to the local authority, on pain of forfeiting the whole or part of the sum paid, which is to be applied as a Court of summary jurisdiction may direct. The Court may, if necessary, order the transfer of the child to a place or a workhouse, or "a place of safety," *i.e.* any suitable place, the occupier whereof is willing to receive the child (ss. 5, 15).

Duties of Local Authority.—The local authorities in England for the purposes of the Act are, in the city of London, the Common Council, in the rest of the county the County Council, and elsewhere the Board of Guardians (s. 15, sched.).

It is the duty of the local authority to inquire as to any cases of the receipt of infants of which they ought to have notice under the Act (s. 3 (1)), and they may appoint, singly, or in combination with other authorities, inspectors, who may (1) inspect infants as to whom notice has been received, and the dwellings in which they are kept; (2) under search-warrant from justices, enter any premises to which they are refused admittance, or in which they have reason to believe infants are being kept in contravention of the Act.

The local authority on receipt of a notice must fix the number of infants under five years which may be retained or received in a dwelling as to which a notice has been received (s. 4), and must give public notice of the provisions of the Act by publishing an abstract in the manner directed by a Secretary of State (s. 6, St. R. & O., 1897, No. 826).

The local authority may, on the application of an inspector or officer appointed for the purposes of the Act, order the removal of any infant improperly kept to a "place of safety" (ss. 7, 15) or a workhouse.

The following persons are prohibited from receiving infants under the Act, save by express sanction of the local authority:—

(*a*) Persons from whose care an infant has been removed under sec. 7.

(*b*) Persons convicted of an offence under the Prevention of Cruelty to and Protection of Children Acts, *i.e.* apparently those in force before 57 and 58 Vict. c. 41, as well as that Act and its amendments (s. 7 (4)).

Notice of the death of an infant within the Act must be given to the coroner within twenty-fours of the death (s. 8).

Offences.—The Act creates the following offences, all to be prosecuted under the Summary Jurisdiction Acts, and all, save as otherwise stated, punishable by penalty not exceeding £5, or imprisonment for not over six months (ss. 9, 11). The term of imprisonment entitles accused to elect for trial on indictment (42 and 43 Vict. c. 49, s. 17), and the amount of the fine gives an appeal to Quarter Sessions (42 & 43 Vict. c. 49, s. 32):—

(1) Failure to give the prescribed notice (s. 2 (4)).

(2) Knowingly or wilfully making, or causing or procuring the making, of a false statement in the notice (s. 2 (4)).

(3) Refusing to admit local officers to inspect infants or dwellings, or obstructing execution of a search-warrant (s. 3 (6) (7)).

(4) Keeping more children under five than the local authority allows (s. 4).

(5) Retaining or receiving a child by a person disqualified to retain or receive (s. 7 (4)).

(6) Failure to give prescribed notice of death to the coroner (s. 8).

Expenses.—Penalties recovered under the Act go to the local authority, and the expenses of its enforcement are paid out of the poor-rate, except in the county and city of London (ss. 10, 12, sched.).

Exceptions.—The Act does not apply to relatives or guardians of an infant under five (whether legitimate or not), nor to children boarded out under the Poor Law Acts or Orders, nor to hospitals, convalescent homes, or institutions established for the protection and care of infants, and conducted in good faith for religious or charitable purposes (ss. 14, 15).

Infants.

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I. Introduction.

Upon attaining twenty-one years of age a person is said to "attain full age" or "attain his or her majority." Until the attainment of that age a man or woman is an infant or minor and the period between birth and the attainment of full age is the period of infancy or minority.

The day of a person's birth is included in computing his age, and the last day of the twenty-first year of his age is in law the day on which he attains his majority. This rule, coupled with the rule that the law does not generally recognise fractions of a day (*fractionem diei non recipit lex*), leads to the singular result that a man may, according to legal computation, attain twenty-one years of age nearly two days before he has actually completed twenty-one years. Thus, if X. be born on the 5th November 1897,

just before midnight, that day is to be included; if he die on the 4th November 1918, though only a few minutes after midnight, he will in the eye of the law have ceased to be an infant at the time of his death; for he will attain twenty-one years of age at the first instant of the 4th November 1918, although nearly forty-eight hours will then be wanting actually to complete twenty-one years from the instant of his birth (*Anonymous* case, cited by Holt, L.C.J., 1 Raym. (Ld.) 480).

For legal purposes the period of infancy is mainly important with respect to the disabilities to which infants are subject; but it is also attended with certain privileges, which exempt infants from the performance of duties obligatory upon persons of full age and from amenability to criminal proceedings.

II. Criminal Law.

In order that an act or default may amount to a crime and be punishable accordingly, it must, in addition to satisfying all other conditions of criminality, be done or made by a person of competent age. It is said that in some misdemeanours which consist in mere *non-feasance*, that is to say in the failure to discharge some active duty imposed upon the defendant by law, an infant is exempt from liability, for the infant "not having the command of his fortune till twenty-one wants the capacity to do those things which the law requires" (Black. *Com.* bk. iv. ch. 2). In such cases the period of immunity corresponds with the period of infancy. But it would seem that where an infant landowner is charged with the repair of a bridge *ratione tenuræ*, infancy would not exempt him, if there were no other person against whom performance of the repairs could be enforced (*R.* v. *Sutton*, 1835, 3 Ad. & E. 597). It would thus seem that the doctrine of the immunity of infants from criminal liability in cases of mere *non-feasance* is not very clearly defined. Putting these very exceptional cases on one side, infancy is not the criterion of criminal responsibility. The fact that the accused person is under the age of twenty-one years is irrevelant to the question of his amenability to punishment. The criminal law has special rules upon the subject.

Under the age of *seven*, a child is not criminally responsible for his actions; for until he reaches that age he is presumed to be *doli incapax*, and the law will not receive evidence to rebut this presumption. From *seven* to *fourteen*, according to the books, he is still *primâ facie* deemed by law to be *doli incapax*; but this presumption, it is laid down, may be rebutted by strong and pregnant evidence of a mischievous discretion, for the capacity to do evil and contract guilt is not so much measured by years and days as by the strength of the delinquent's understanding and judgment (Black. *Com.* bk. iv. ch. 2); accordingly it is said, *malitia supplet ætatem*. This presumption of incapacity, however, though well established in theory, has little, if any, practical operation; children of average intelligence under fourteen years of age being generally, if not universally, dealt with in the same manner as young persons over that age, due allowance being made, as to children and young persons whether under or over that age, in respect of their tender years and inexperience, wherever their knowledge, intention, malice, or other state of the mind is material to be taken into consideration, and due regard being had to the youth of the offender in awarding punishment. There is one important exception to the rule which is grounded upon presumed physical reasons. A boy under the age of fourteen years cannot be convicted of rape, or of any similar offence, as a principal in the first degree, the law conclusively presuming that he is physically incapable of perform-

ing the act (1 Hale, 631). He may, however, be guilty of any such offence as an accessory or as a principal in the second degree (1 Hale, 639). A boy under fourteen, indicted under sec. 4 of the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), for having had carnal knowledge of a girl under thirteen, though entitled to be acquitted of the felony, was held to have been properly convicted under sec. 9 of that Act, of an indecent assault (*R.* v. *Williams*, [1893] 1 Q. B. 320).

There are, moreover, certain offences created by statute, which, according to the express terms of the statutes creating them, are only capable of being committed by persons above a certain age. One of these must suffice as an example. By the Prevention of Cruelty to Children Act, 1894 (57 & 58 Vict. c. 41), s. 1, it is a misdemeanour for any person *over the age of sixteen years* who has the custody, charge, or care of any child under the age of sixteen years wilfully to ill-treat such child. With reference to criminal law and procedure, children and young persons are dealt with in many respects differently from adults. Thus, under the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), "children" under twelve years of age (s. 49) may be dealt with summarily under certain conditions, in respect of any indictable offence other than homicide (s. 10); and similarly "young persons" of the age of twelve years but under the age of sixteen years (s. 49) may with their consent under certain conditions be dealt with summarily, in respect of the offences specified in the First Schedule to the Act.

By the Larceny Act, 1861 (24 & 25 Vict. c. 96), the Malicious Damage Act, 1861 (24 & 25 Vict. c. 97), and the Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), whipping may be inflicted for a variety of specified offences on males under the age of sixteen, and in one case (Larceny Act, 1861, s. 101) on males under the age of eighteen. "Children" and "young persons," when dealt with summarily under the Summary Jurisdiction Act, 1879, may be sentenced to be whipped with a birch rod. "Youthful offenders," apparently less than sixteen but not less than twelve years of age, if proved to have been previously convicted of any offence punishable with penal servitude or imprisonment, may be sent to a reformatory school (the Reformatory Schools Acts, 1866 and 1893, 29 & 30 Vict. c. 117, and 56 & 57 Vict. c. 48). See REFORMATORY SCHOOLS.

Children apparently under the age of twelve charged with offences punishable by imprisonment or a less punishment, but not having been previously convicted of felony, may be sent to an industrial school (the Industrial Schools Act, 1866, 29 & 30 Vict. c. 118, s. 15), and so may children apparently under the age of fourteen under the circumstances specified in sec. 14 of that Act, as amended by the Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112, s. 14), and by the Industrial Schools Act, 1880 (43 & 44 Vict. c. 15). See INDUSTRIAL SCHOOL.

Youthful offenders are frequently leniently dealt with under the provisions of the FIRST OFFENDERS ACT, 1887 (50 & 51 Vict. c. 25), but the provisions of that Act are not limited to persons under any particular age. Children and young persons are specially protected by the criminal law by virtue of numerous enactments scattered throughout the statute-book, but these belong for the most part to subjects specially dealt with in other parts of this work. It is not proposed to attempt any complete enumeration of them in this place; but amongst the most important are the Prevention of Cruelty to Children Act, 1894 (57 & 58 Vict. c. 41); the Children's Dangerous Performances Act, 1897 (60 & 61 Vict. c. 52); the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69); the Offences against the Person Act, 1861

(24 & 25 Vict. c. 100), ss. 26, 27, 43, 50, 51, 53, 54, 55, 56, 60, 73; the Infant Life Protection Act, 1897 (60 & 61 Vict. c. 57); the Betting and Loans (Infants) Act, 1892 (55 Vict. c. 4). It may be noted that an infant may be convicted of larceny as a bailee (*R.* v. *Macdonald*, 1885, 15 Q. B. D. 323).

III. Civil Injuries.

Speaking generally, infancy is no protection against a claim founded upon a civil injury or *tort* committed by an infant defendant. For instance, if a child of tender years throw a stone and break a window, the person aggrieved is entitled to sue that child and recover damages. The plaintiff might experience a difficulty in such a case in recovering the fruits of his verdict, if the infant defendant were not possessed of property available for execution; but this difficulty is not peculiar to actions against infant defendants. In those cases of tort, however, in which intention, knowledge, malice, or some other condition of the mind of the wrong-doer forms an essential ingredient of the civil injury complained of, extreme youth may afford a defence which would not be open to an adult wrong-doer, or to an infant wrong-doer of a more advanced age. Many cases might easily be put in which it would be absurd to impute knowledge, intention, or malice to a very young child, though such knowledge, intention, or malice would be readily imputable to an adult. Infants are liable for wrongs of omission as well as for wrongs of commission; and with respect to wrongs of omission probably no better criterion of liability can be suggested than the homely one, "Was he old enough to know better?"

In cases where the injury complained of is failure on the part of the infant defendant to exercise due care, and in which the happening of actual damage to the plaintiff, consequent upon such failure, is an ingredient in the cause of action, it would probably be true to say that an infant might in many cases escape liability where an adult would be fixed with liability, upon the ground that by reason of his tender years he did not foresee, and could not be expected to foresee, the consequences which in fact resulted from his negligence. The writer is not aware of any case in which this question has been adequately discussed. The cases which have arisen in which the negligence of children has been considered fall into three classes, viz.—(1) where an adult defendant has been sued for damages for an injury caused directly by the negligence of a child, but indirectly by his own negligence; (2) where a child plaintiff has been met with the defence of his own contributory negligence; (3) where a child plaintiff has been met with the defence of contributory negligence on the part of the person under whose care the plaintiff was. *Dixon* v. *Bell* (1816, 5 M. & S. 198; 17 R. R. 308), in which the defendant, being possessed of a loaded gun, sent a young girl to fetch it, with directions to take the priming out, and the girl carelessly discharged the gun at the plaintiff, affords a sufficient illustration of the first class of cases. The defendant was held liable. The second and third classes belong more properly to our present subject.

Lynch v. *Nurdin* (1841, Q. B. 29) is the type of the second class, and the leading authority. In that case the defendant negligently left a cart unattended; the plaintiff, a child of seven, got upon the cart in play; another child incautiously led the horse on, and the plaintiff was thereby thrown down and injured. It was held that the plaintiff was entitled to recover, upon the ground (as explained by Parke, B., in *Lygo* v. *Newbould*, 1854, 9 Ex. Rep. 302) that the plaintiff had taken as much care as could

be expected from a child of tender years; in short, that the plaintiff was blameless, not being old enough to know better. Here again, therefore, the question "Was the child old enough to know better?" would seem to afford the criterion of liability. If he was old enough to know better, any contributory negligence on his part must have the same effect attributed to it as if he were adult. It may be observed that the mere fact of an accident happening to a very young child will not raise a presumption of negligence, any more than in the case of an adult (*Singleton* v. *The Eastern Counties Rwy. Co.*, 1859, 7 C. B. N. S. 287; *Williams* v. *Great Western Rwy. Co.*, 1874, L. R. 9 Ex. 157, in which last-mentioned case negligence on the part of the defendants was established).

The third class of cases, being cases where a child plaintiff has been met with the defence that the injury complained of was brought about by the negligence of the person having charge of him at the time, have been greatly complicated and obscured by the application to them of the exploded doctrine of identification (*Mills* v. *Armstrong*, 1883, 13 App. Cas. 1). The true principle is now recognised to be that where a child plaintiff of tender years, in the custody of an adult, sustains an injury under circumstances tending to prove negligence on the part of the defendant, and also contributory negligence on the part of such adult, the defendant will not be liable to the plaintiff if the negligence of such adult alone was the proximate cause of the injury. Therefore, if the adult who had charge of the plaintiff could, by such reasonable diligence as is incumbent upon persons having the care of young children, have avoided the consequences of the defendant's negligence, the plaintiff is not entitled to recover; and this not because the adult's negligence is imputed to the plaintiff upon any doctrine of identification, but because the plaintiff fails to establish that the negligence of the defendant was the proximate cause of the injury. In such a case the injury is caused, not by the negligence of the defendant, but by something else for which the defendant is not responsible, and which he had no reason to anticipate (Pollock on *Torts*, 4th ed., p. 425). Of course, if the child plaintiff can establish in such a case that, notwithstanding the contributory negligence of the adult under whose care he was, the defendant, by the exercise of reasonable care, could nevertheless have avoided the accident, he will be entitled to recover (*Radley* v. *London and North-Western Rwy. Co.*, 1876, 1 App. Cas. 754). There are authorities in the United States to the effect that a child plaintiff may be debarred from recovering damages for an injury caused by negligence of the defendant, on the ground of negligence in the adult person under whose charge the plaintiff was, in allowing him to go alone (Holmes, *Common Law*, 128); but the cases are not consistent (Pollock, *Torts*, 4th ed., 427), and this doctrine is not likely to meet with acceptance in this country.

With reference to the second class of cases, it is to be observed that the doctrine of *Lynch* v. *Nurdin* (*ubi supra*) has not been universally received. *Hughes* v. *Macfie*, 1863, 33 L. J. Ex. 177, and *Mangan* v. *Atterton*, 1866, L. R. 1 Ex. 239, are decisions which are in conflict with it. In the former case the defendants placed the shutter of their cellar against the wall of a public street, and the dress of a child, who was playing in the street and jumping off the shutter, caught the corner of the shutter, which fell upon and injured him. It was ruled that the defendants were not liable to the child, on the ground that an adult could not have maintained an action, and that the fact that the plaintiff was a child of tender years made no difference. In the latter, the defendant had exposed in a street, without superintendence, a machine for crushing oilcake, and the plaintiff, a child of

four, was passing with his brother, aged seven, and, by the direction of his brother, put his fingers into the cogs, and got them crushed. The defendant was held not liable. It is conceived that the doctrine of *Lynch* v. *Nurdin* is the more sound, and will probably prevail over that of the two cases last mentioned. The recent case of *Fenna* v. *Clare*, [1895] 1 Q. B. 199, may be noticed, in which a little girl, aged five, hurt herself by climbing upon a low wall adjoining a highway, having a row of spikes on the top, and was held entitled to recover.

In that class of cases in which, under the old system of pleading, it was optional to sue in contract or in tort, the rule is that a contract cannot be converted into a tort in order to fix an infant with liability (*Jennings* v. *Rundall*, 1799, 8 T. R. 335; 4 R. R. 680; *Fairhurst* v. *Liverpool Adelphi Loan Association*, 1854, 9 Ex. Rep. 422). Thus no action lies against an infant for fraudulently representing himself as of full age, and thereby inducing a person to contract with him (*Johnson* v. *Pie*, 1666, 1 Sid. 258; *Slikeman* v. *Dawson*, 1847, 1 De G. & Sm. 90, 113). "But where an infant commits a wrong of which a contract, or the obtaining of something under a contract, is the occasion, but only the occasion, he is liable" (Pollock, *Torts*, 4th ed., p. 50). This proposition is well illustrated by *Burnard* v. *Haggis*, 1863, 32 L. J. C. P. 189. In that case the defendant, an infant, hired a horse for a ride on the road, the owner expressly refusing to allow the horse to be used for jumping. The defendant, however, lent the horse to a friend, who rode it with the defendant's permission across the fields, and at fences, in endeavouring to jump which the horse was injured; and it was held that this was an actionable wrong, independent of the contract, and that therefore the defendant was liable, notwithstanding his infancy. An infant to whom chattels are bailed for a certain purpose could not, of course, plead infancy in an action of detinue brought against him to recover them back. (See *Burton* v. *Levey*, 90 L. T. Jo. 283.)

IV. Capacities and Disabilities of Infants.

An infant, when of the age of discretion, is deemed capable of exercising such offices as require only skill and discretion, and do not concern the administration of justice. Thus it is said that he can fill the offices of park-keeper, gaoler, or forester, either by himself or by deputy (Bac. *Abr.* "Infancy" (E)). He may serve in the Queen's forces, either as an officer or in the ranks. He may be lord of a manor, and as such make a grant of copyhold land; for he is but as an instrument in making the grant (*Swayne's* case, 1609, 3 Rep. 63). An infant may be appointed as agent, and in that capacity has the ordinary authority of an agent to bind his principal (Bac. *Abr.* "Authority" (B); Story, *Agency*, s. 7). He may be a private attorney to deliver seisin, for livery of seisin is only a ministerial act (*Co. Litt.* 52 *a*). He is entitled to fill an office which is purely ministerial, and on this ground an appointment of an infant as clerk of the peace has in Ireland been held to be valid (*Crosbie* v. *Hurley*, 1833, Al. & Nap. 431).

An infant cannot fill an office of public or pecuniary trust, nor, generally speaking, one that requires knowledge, experience, and judgment (*Claridge* v. *Evelyn*, 1821, 5 Barn. & Ald. 81; 24 R. R. 289; Bac. *Abr.* "Infancy" (E); Eversley, *Domestic Relations*, 2nd ed., p. 713). Thus he cannot be a sheriff's officer or bailiff (*Cuckson* v. *Winter*, 1828, 2 Moo. & R. 313), a receiver (*Co. Litt.* 172 *a*), a guardian (Vin. *Abr.* "Guardian"), or an attorney to carry on a suit (*Co. Litt.* 128 *a*).

An infant may not be a deacon or priest (13 Eliz. c. 12; 44 Geo. III. c. 43). He cannot be enrolled as a burgess, nor hold the office of town

councillor, burgess, or mayor (45 & 46 Vict. c. 50, ss. 9 (2) *a*, 11 (2) *a*, 14 (3)). He is not entitled to sit as, or vote for, a member of the House of Commons, nor, if a peer, can he take his seat in the House of Lords (7 Will. & Mary, c. 25, s. 8; Standing Order of the House of Lords, 22nd May 1686. See Anson, *Law of the Constitution*, Part I. pp. 76, 118, 211).

An infant cannot be a juror (6 Geo. IV. c. 50, s. 1), but he may, of course, be a witness, if he can understand the nature of an oath. In cases under sec. 4 of the Criminal Law Amendment Act, 1885, the unsworn evidence of a child too young to understand an oath may be received, if the child be sufficiently intelligent to justify the reception of its evidence, and understand the duty of speaking the truth.

An infant who has reached the age of fourteen if a male, or twelve if a female, can contract a valid marriage. A marriage where either party is below the age of consent is not void. It remains good if, when both parties are of the age of consent, they so agree (Bac. *Abr.* "Infancy" (A)).

An infant may be a shareholder in a company, though on attaining his majority he may repudiate his shares (*In re Laxon & Co.*, [1892] 3 Ch. 555); but a company may refuse to accept an infant as a shareholder (*Symons'* case, 1870, L. R. 5 Ch. 298), and after a transfer of shares to an infant, in the case of a winding-up while the transferee remains an infant the transferor is liable as a contributory (*Cappon's* case, 1868, L. R. 3 Ch. 458). An infant can be appointed a trustee; but he is considered to be wanting in capacity to execute any trust which requires the exercise of discretion (*King* v. *Bellord*, 1863, 1 H. & M. 343). The Court will, on this ground, appoint a new trustee in his place, and make a vesting order in respect of the trust property (Trustee Act, 1893, ss. 25, 26, 35; *In re Porter's Trusts*, 1856, 25 L. J. Ch. 482); but the appointment should be without prejudice to any application by the infant to be restored to the trusteeship on his coming of age (*In re Shelmerdine*, 1864, 33 L. J. Ch. 475).

An infant trustee cannot be made liable for a breach of trust as such, unless the breach is a continuing one, and he acquiesces in it after he comes of age (*Hindmarsh* v. *Southgate*, 1827, 3 Russ. 324; 27 R. R. 81). There may, however, be circumstances where an infant trustee is liable for moneys received by him, as where his conduct has been fraudulent; and an inquiry may be ordered as to the trust moneys received by an infant trustee (*In re Garnes*, 1885, 31 Ch. D. 147; Lewin on *Trusts*, 9th ed., p. 38).

An infant may present to a living of which he is the patron (*Co. Litt.* 89 *a*). The reason given is that there can be no inconvenience, because the bishop is to judge of the clerk's qualifications (*Hearle* v. *Greenbank*, 1749, 3 Atk. 710).

When, in the reign of Henry VIII., the right was given to devise land held in fee-simple, the privilege was expressly withheld from infants (32 Hen. VIII. c. 1; 34 Hen. VIII. c. 5). The Ecclesiastical Courts used to grant probate of wills of personalty made by males at the age of fourteen or females at the age of twelve (Bac. *Abr.* "Wills" (B)). The Wills Act, 1837, however, declares that no will made on or after the 1st of January 1838 by any person under the age of twenty-one shall be valid (7 Will. IV. and 1 Vict. c. 26, s. 7); but by sec. 11, soldiers in actual military service or mariners at sea may dispose of their personal property as they might have done before the Act.

Sec. 8 of the Act which abolished feudal tenures (12 Car. II. c. 24) gave an infant father the right to appoint a guardian to his children by deed or will. As the will of an infant is now invalid, such an appointment can now only be made by deed.

The appointment of an infant as executor, however young he may be, is not invalid (Williams, *Executors*, 9th ed., vol. i. p. 184). Formerly he was considered capable of exercising the office on attaining the age of seventeen (*ibid.* p. 185 *n.* (*g*)). The Statute 38 Geo. III. c. 87, s. 6, however, enacted that probate of a will cannot be granted to a sole executor until he reaches the age of twenty-one, and that for the period of his minority, administration *cum testamento annexo* shall be granted to his guardian or to such other person as the Court shall think fit. When there are two or more executors, and one is of full age, administration *durante minoritate* ought not to be granted, as the executor who is of full age can execute the will (*ibid.* p. 185).

An infant executor is not liable for *devastavit* committed by himself or his co-executor; nor if he be an executor *de son tort* is he liable, if he waste assets which have come into his hands (*Whitmore* v. *Veld*, 1685, 1 Vern. 328; *Hindmarsh* v. *Southgate*, 1827, 3 Russ. 324; 27 R. R. 81; *Stott* v. *Meanoak*, 1862, 31 L. J. Ch. 746).

An infant may execute a power simply collateral, if he be merely the instrument by whose hands the testator or donor acts (Sugden, *Powers*, 8th ed., p. 177; *King* v. *Bellord*, 1863, 1 H. & M. 343, 348). An infant may also exercise a power coupled with an interest, if the instrument creating the power show an intention that it should be exercisable during minority (*In re Cardross's Settlement*, 1878, 7 Ch. D. 728; *In re D'Angibau*, 1880, 15 Ch. D. 228).

V. Contracts.

The general rule of the common law is that an infant's contract is not binding on him, unless it be for necessaries. At common law, however, the contract, provided it was for the infant's benefit, was not absolutely void as against him, but only voidable; and if, after reaching the age of twenty-one, he ratified it, he was bound by his promise, although there was no new consideration for the ratification (Bac. *Abr.* "Infancy" (I), 1, 3, 8; Chitty on *Contracts*, 13th ed., pp. 173, 185). The common law rule has been largely altered by the Infants' Relief Act, 1874. Sec. 1 of that Act provides that all contracts entered into by infants for the repayment of loans or for the purchase of goods (except necessaries), and all accounts stated with infants, are absolutely void. A declaration follows that this provision shall not invalidate any contract into which an infant may enter either by statute or by the rules of common law or equity, except such as at the time of the enactment were by law voidable. Whether a contract which is clearly not for the benefit of the infant was at common law absolutely void as against the infant (so as to be incapable of ratification) or only voidable is not free from doubt. There are cases in which it has been said that such a contract is void, but they are cases in which it was not necessary to distinguish between void and voidable contracts; and it must not be forgotten that the word "void" was frequently used formerly in the sense in which "voidable" is now used. (See Pollock on *Contracts*, 6th ed., pp. 52–58, where the authorities are fully examined.) Sir F. Pollock comes to the conclusion that an infant's contract was in every case only voidable, and his view is shared by Sir William Anson. (See Anson, *Contracts*, 8th ed., p. 108.) The distinction has lost much of its importance, as sec. 2 of the Infants' Relief Act, 1874, provides that no action shall be brought whereby to charge any person upon a ratification after full age of a contract made during infancy, even if there be new consideration for the ratification. (See *Smith* v. *King*, [1892] 2 Q. B. 543.)

Sec. 5 of the Betting and Loans (Infants) Act, 1892, further provides

that if an infant who has contracted a void loan agrees, after he comes of age, to repay it, the agreement and any instrument given in pursuance of the agreement, or to carry it into effect, shall, so far as it relates to money payable in respect of the loan, be void absolutely as against all persons whatsoever.

A ratification of a promise made in infancy must be distinguished from a new contract made after full age identical with one made in infancy. Such new contract is not within sec. 2 of the Infants Relief Act, 1874 (*Ditcham* v. *Worral*, 1880, 5 C. P. D. 410).

A person who contracts with an infant cannot repudiate his agreement on the ground of the other party's infancy. He may therefore be sued for a breach of the contract, although he cannot enforce it (*Holt* v. *Ward Clarencieux*, 1733, 2 Stra. 937; *Warwick* v. *Bruce*, 1813, 2 M. & S. 205; 14 R. R. 634). An infant cannot, however, obtain specific performance of a contract, for specific performance will not be granted where the remedy is not mutual (*Flight* v. *Bolland*, 1828, 4 Russ. 298).

Whether accounts stated and the contracts which come under sec. 1 of the Infants Relief Act, 1874, are void as against both parties or only as against the infant, is a question which has not arisen. It is submitted that they are void only as against the infant. (See Chitty on *Contracts*, 13th ed., p. 174.)

The term "necessaries" in relation to an infant's contract does not mean only things such as food, clothing, or lodging, which are necessary to the support of life. It includes such useful articles as are suitable to the age, rank, and condition in life of the infant. Thus a watch may be a necessary thing for a young man at college, and it may follow that a chain for securing it may also be a necessary; but articles which are purely ornamental can never be considered necessaries, because they cannot be requisite for anyone (*Peters* v. *Fleming*, 1840, 6 Mee. & W. 42; *Ryder* v. *Wombell*, 1868, L. R. 4 Ex. 32). There were conflicting cases before the Sale of Goods Act, 1893, on the point whether articles could be considered necessaries, when at the time of their purchase by the infant he was sufficiently supplied with things of the kind. (See *Johnson* v. *Marks*, 1887, 19 Q. B. D. 509.) Sec. 2 of the Sale of Goods Act, 1893, following the cases just cited, makes the requirements of the infant at the time of sale and delivery one of the tests whether goods are necessaries. If he can show that at either time he was sufficiently provided with goods of the kind, he is not liable. The same section of the Act provides that an infant is only obliged to pay a reasonable price for necessaries supplied to him.

There are other things besides those already mentioned which may be necessaries. For instance, medicines and medical services are clearly necessaries. An infant may bind himself to pay for schooling or for instruction in a trade suitable to his condition in life (*Co. Litt.* 172 *a*; *Walter* v. *Everard*, [1891] 2 Q. B. 369). It has also been held that a marriage settlement is a necessary for a female infant, and therefore that she is liable to pay the costs of a solicitor employed by her to prepare one (*Helps* v. *Clayton*, 1844, 13 Mee. & W. 252).

An infant cannot be sued on a bond or bill given to secure the payment of the price of necessaries, but giving the bond or bill does not prevent his being sued for the price of the necessaries (*In re Soltykoff*, [1891] 1 Q. B. 413; *Williamson* v. *Watts*, 1808, 1 Camp. 552). At common law an infant was not liable to pay back money lent to him for the purchase of necessaries (*Earle* v. *Peale*, 1712, 1 Salk. 386). In equity, however, one who lent money to an infant to pay a debt for necessaries was held entitled to stand

in the place of the creditor for necessaries (*Marlow* v. *Pitfeild*, 1719, 1 P. Wms. 558).

It is not illegal for an infant to engage in trade; but it is not a necessity for him to trade on his own account, and he cannot be sued on his trading debts, nor on contracts entered into by him for the purpose of carrying on a trade (*Ex parte Jones, In re Jones*, 1881, 18 Ch. D. 109). Thus, where an infant rented certain premises for the purpose of carrying on a business, it was held that he could not be sued for the rent (*Lowe* v. *Griffith*, 1855, 1 Sco. 458). It follows from the fact that trading debts are not binding on an infant that he cannot be made bankrupt in respect of them (*Ex parte Jones, supra*).

Contracts of service stand on a different footing. An infant not of tender years usually has to earn his living, and a contract by which he gets employment, which as a whole is beneficial to him, is binding on him (*Leslie* v. *Fitzpatrick*, 1877, 3 Q. B. D. 229; *Evans* v. *Ware*, [1892] 3 Ch. 502). A beneficial agreement entered into by an infant to enable him to perform a contract of service is apparently in the nature of a contract for necessaries, and binding (*Flower* v. *London and North-Western Rwy. Co.*, [1894] 2 Q. B. 65). It is, however, settled law that an infant cannot be sued on a covenant to serve in a deed of apprenticeship, though he can in many cases be proceeded against under the Employers and Workmen Act, 1875. (See vol. i. APPRENTICES, and *De Francesco* v. *Barnum*, 1889, 43 Ch. D. 165.)

There is one class of contracts in which ratification is implied, unless the infant repudiates the agreement either before or within a reasonable time after he has come of age. This class consists of contracts, under which an infant has acquired or granted an interest in land or property of a permanent nature to which obligations are attached, and of contracts which involve continuing rights and liabilities. Thus if an infant has taken a lease of real property, or acquired shares in a company, or become a member of a friendly society, express ratification is not necessary to subject him to the liabilities of a lessee or shareholder or member (*North-Western Rwy. Co.* v. *M'Michael*, 1850, 5 Ex. Rep. 114; *Dublin and Wicklow Rwy. Co.* v. *Black*, 1852, 8 Ex. Rep. 181; *Whittingham* v. *Murdy*, 1889, 60 L. T. 596). The rule applies also to a marriage settlement (*Edwards* v. *Carter*, [1893] App. Cas. 360).

What is a reasonable time to be allowed for repudiation depends on the circumstances of each case. When the infant has derived no benefit from the contract, and the position of other parties has not been affected by the delay, the contract may be repudiated after a very considerable time. Thus in one case it was held that a lady could repudiate a settlement made by her thirty-seven years previously, as under it she had not received any income (*In re Jones, Farrington* v. *Forrester*, [1893] 2 Ch. 461).

It must, however, be remembered that an infant's marriage settlement is absolutely binding by virtue of 18 & 19 Vict. c. 43, if made with the sanction of the High Court by a male of the age of twenty years or a female of the age of seventeen. (For the evidence required by the Court, see Order 55, r. 26.)

Contracts which required to be repudiated in order to be avoided were not affected by the provision of Lord Tenterden's Act, which required a ratification of a contract made in infancy to be in writing. Doubts have been expressed whether they are affected by the provision of the Infants Relief Act, 1874, by which no action can be brought on a ratification after full age; but it is clear that sec. 2 of the Act of 1874 touches only those contracts that needed express ratification, and does not affect the contracts

which had to be repudiated to avoid them (*Whittingham* v. *Murdy* and *Edwards* v. *Carter, ante*).

If this view be correct, the question whether a contract which is disadvantageous to the infant is void or voidable is still of importance in relation to the continuing contracts which have just been considered. Acquiescence could not make a contract binding which was actually void. It is, however, submitted that the true rule of the common law is that stated by Sir F. Pollock, viz. that an infant's contract, even though not advantageous to him, was only voidable. This view is confirmed by the judgment of the Court of Exchequer in *North-Western Rwy. Co.* v. *M'Michael* (1850, 5 Ex. Rep. 114, 126).

Where there has been an express misrepresentation by an infant as to his age, the Courts of equity in certain cases granted relief in respect of his contracts. For instance, when an infant trader obtained credit by expressly representing himself to be of age, and after attaining his majority became bankrupt, the Courts of equity allowed the creditor to prove for his debt (*Ex parte Unity Banking Association*, 1858, 3 De G. & J. 63). The equitable obligation is founded on the principle that "an infant who has represented himself as of full age is bound by payments made and acts done at his request and on the faith of such representations, and is liable to restore any advantage he has obtained by such representations to the person from whom he has obtained it" (Pollock on *Contracts*, 6th ed., pp. 52, 73–76).

At common law it was no defence to a plea of infancy that the defendant when making an agreement represented himself to be of full age (*Bartlett* v. *Wells*, 1862, 1 B. & S. 836). Whether since the Judicature Act declared that the rules of equity are to prevail over those of the common law a defence of infancy to a common law claim can be sustained when the defendant by his fraud induced the other party to enter into the contract, is a question of some difficulty which the Courts have not been called on to decide. (See *Bartlett* v. *Wells, supra*; Pollock on *Contracts*, 6th ed., p. 73; Roscoe, *N. P.*, 16th ed., p. 642.)

An infant's right on avoiding a contract to recover back money paid by him seems to depend on the question whether he has derived any benefit from the contract. In one of the earlier common law cases an opinion of Lord Mansfield's was adopted, that "if an infant pays money with his own hand without a valuable consideration for it, he cannot get it back again" (*Holmes* v. *Blogg*, 1817, 8 Taun. 508; 19 R. R. 445; see also *Wilson* v. *Kearse*, 1800, Peake Ad. Cas. 197). Subsequently, however, it was settled that money paid by an infant under a contract avoided by him before he received consideration is recoverable (*Corpe* v. *Overton*, 1833, 10 Bing. 252). Recently, again, where an infant had subscribed for shares in a company, but had received no dividend, she was allowed on repudiating the shares to prove in the liquidation of the company for the amount paid up on the shares (*Hamilton* v. *Vaughan Sherrin Electrical Engineering Co.*, [1894] 3 Ch. 589). On the other hand, where an infant had hired and occupied a house and bought and used the furniture in it, it was held that he could not recover part of the price of the furniture already paid, although the contract was void under the Infants Relief Act (*Valentine* v. *Canali*, 1889, 24 Q. B. D. 166).

VI. Procedure in Actions by and against Infants.

Infants may sue in the High Court as plaintiffs by their next friends in the manner formerly practised in the Court of Chancery, and may defend by their guardians appointed for that purpose (Order 16, r. 16; and see Order 16, r. 8 of the Rules of 1875). See Guardian ad litem; Next Friend.

Service may, unless the Court or a judge orders otherwise, be effected on the father or guardian of an infant defendant, or if none, then upon the person with whom the infant resides or under whose care he is. The Court or judge may, however, order that service made upon the infant shall be deemed good service (Order 9, r. 4).

The next friend may be any person not under a disability and not out of the jurisdiction; but a next friend will be removed if he have any interest in the action adverse to the infant, or be connected with a defendant, or misconduct himself in the prosecution of the action (*Lewis* v. *Nobbs*, 1878, 8 Ch. D. 591; *In re Burgess*, 1883, 25 Ch. D. 243; *Dupny* v. *Welsford*, 1880, 28 W. R. 762). A father, to whom there is no objection as next friend, has a right to be appointed as such, and on his application will be substituted for another person who has acted as next friend (*Woolf* v. *Pemberton*, 1877, 6 Ch. D. 19). The guardian *ad litem*, it has been said, should be a relation or friend of the infant's, and not a mere volunteer (*Foster* v. *Cantley*, 1853, 10 Hare, App. xxiv.). If necessary, the Court will appoint the official solicitor to act as next friend or guardian *ad litem* (*In re Corsillis*, 1883, 31 W. R. 414; Order 65, r. 13).

The next friend is not a party to the action (*Dykes* v. *Stephens*, 1883, 30 Ch. D. 189). He is, however, liable to the defendant for all the costs of the action (*Frank* v. *Mainwaring*, 1841, 4 Beav. 37). As between himself and the infant he is *primâ facie* entitled to costs (*Clayton* v. *Clarke*, 1861, 3 De G. & J. 682, 687), but will not be indemnified when he has improperly taken proceedings in the name of the infant (per Lindley, L.J., *In re Fish*, 1883, 2 Ch. at p. 422). A guardian *ad litem* is not presumably liable to the costs of the action, except in case of gross misconduct (*Morgan* v. *Morgan*, 1865, 11 Jur. N. S. 233).

Under the practice of the Court of Chancery an admission could not be made by or on behalf of an infant (Daniell's *Chancery Practice*, 6th ed., p. 178). As an exception to the general rule in pleading, this principle has been followed in the Rule which provides that facts not specifically denied are not to be taken as admitted as against infants (Order 9, r. 4). On the same principle it was the rule in Chancery that neither an infant, nor his next friend, nor a guardian *ad litem* could be compelled to answer interrogatories or to make discovery of documents (Daniell's *Chancery Practice*, 6th ed., p. 1812), and this practice was, after the Judicature Act came into force, followed in the High Court (*Ingram* v. *Little*, 1883, 11 Q. B. D. 251; *Dyke* v. *Stephens*, 1885, 30 Ch. D. 189; *Mayor* v. *Collins*, 1890, 24 Q. B. D. 361; *Curtis* v. *Mendy*, [1892] 2 Q. B. 178). In 1893 an important change in practice was effected by a new Rule, which provides that infants and their next friends and guardians may be ordered to answer interrogatories and to make discovery of documents (Order 31, r. 29).

The practice in divorce proceedings is not regulated by the Rules of the Supreme Court, save as expressly provided therein (Order 58, r. 1 (*d*)). In divorce proceedings the petition must be presented on behalf of an infant by a person, usually one of the next-of-kin, elected as guardian. An infant respondent, but not an infant co-respondent, must also be represented by a guardian in the conduct of the defence (Rules of the Divorce Court, 105–108).

In *Redfern* v. *Redfern*, [1891] Prob. 139, the Court of Appeal, after an exhaustive inquiry, came to the conclusion that in a divorce suit the Chancery practice did not apply, and that an infant could be obliged to make discovery, although an infant cannot be asked to make admissions for the purpose of establishing his or her adultery, adultery being an ecclesiastical offence.

An infant is not bound by the compromise of a suit, unless it is made

with the sanction of the Court, and then only when it is assented to by the next friend or guardian *ad litem* under the advice of counsel (*In re Birchall*, 1880, 16 Ch. D. 41).

When an infant plaintiff attains his majority during the pendency of an action, he may elect whether to proceed with it or not. If he decide to proceed, the action is carried on in his name, and he becomes liable to pay the costs from the beginning (per Parker, V.C., *Bligh* v. *Tredgett*, 1851, 5 De G. & Sm. 74, 77). If he elect to repudiate the action, his repudiation relates back to the beginning; but he is liable to pay the costs incurred, and he cannot recover them from the next friend, unless the action has been improperly brought (*Anon.*, 1819, 4 Madd. 461; *Dunn* v. *Dunn*, 1855, 7 De G., M. & G. 25).

In County Court proceedings, as in the High Court, an infant must in general sue by his next friend and defend by a guardian appointed for the purpose (County Court Rules, 1889, Order 3, r. 9). When, however, his claim is for a sum not exceeding £50, for wages or piece-work or work as a servant, he may prosecute the action in the same manner as if he were of full age (County Courts Act, 1888, s. 96).

Infancy is one of the special defences of which notice must be given to the other party (County Court Rules, 1889, Order 10, rr. 10 and 12).

The rules of discovery which formerly obtained in the Court of Chancery apply by virtue of sec. 89 of the Judicature Act, 1873, to County Courts. As there is at present no County Court Rule analogous to Order 31, r. 29 of the Supreme Court Rules, it follows that discovery cannot be obtained against an infant in a County Court action.

VII. Guardianship.

The father is the natural guardian of his infant children, and at common law he is entitled to the custody of them against all the world, even including the mother (*Wellesley* v. *Duke of Beaufort*, 1827, 2 Russ. 21; *In re Agar-Ellis*, 1883, 24 Ch. D. 317). After the death of the father, the mother is the natural guardian of her children, but at law she had no right to interfere with them against a testamentary guardian appointed by the father (*Eyre* v. *Countess of Shaftesbury*, 1722, 2 P. Wms. 103, 115; *Villareal* v. *Mellish*, 1737, 2 Swans. 533, 538). The rights of the parents as to the guardianship of their children have, however, been profoundly modified both by statute and by the rules laid down by the Court of Chancery. The peculiar rights and duties of parents with regard to their children will be dealt with in the article on Parent and Child; only the ordinary relationship between the guardian and the ward will be considered in this article. It may be pointed out here that the Infant Life Protection Act (*q.v.*), 1897, contains various provisions for the safety of children under the age of five who are maintained for hire apart from their parents.

There are various kinds of guardianship. Of these guardianship (1) by nature, (2) by nurture, (3) in socage, (4) by custom, and (5) by the election of the infant, have either disappeared or practically fallen into disuse. (See as to these, Eversley's *Domestic Relations*, 2nd ed., pp. 588–595, 601.) For the guardianship which was by implication created by the repealed Statute 4 & 5 Phil. & Mary, c. 8, see Simpson, *Infants*, 2nd ed., p. 213. The effect of the statute was held to be that the age to which the right of the parents to enforce their claim to the custody of a female child by *habeas corpus* continued was raised from fourteen years to sixteen.

Guardians by Nature and Nurture.—Guardianship by nature and nurture is the legal right of the father, and after his death, in the absence of an

appointment by him, of the mother, to the custody of their children until they reach the age of twenty-one. (See *In re Agar-Ellis*, and *Villareal* v. *Mellish*, *ante*.) This guardianship only affects the person of the child. At common law, however, the father is the guardian of his child's real property, and until he or someone else is appointed guardian thereof by the Court may receive the profits as a trustee for the child (Black. *Com.* bk. i. c. xvii.).

It has been decided in Ireland that the mother is the natural guardian of her illegitimate child, and therefore under ordinary circumstances entitled to its custody (*In re Darcys*, 1860, 11 Ir. R. C. L. 298; see, however, *Barnardo* v. *M'Hugh*, [1891] App. Cas. 398).

Statutory Guardians.—Sec. 8 of 12 Car. II. c. 24, the Act which abolished feudal tenures, gives the father the right to appoint a guardian or guardians of his infant children, who are to have the custody of the infants and (s. 9) the management of their property until they reach the age of twenty-one.

Before the year 1886 the mother had no right to appoint a guardian to her child, nor could she as natural guardian assert any right of guardianship against a guardian appointed by the father. In that year, however, the Guardianship of Infants Act (49 & 50 Vict. c. 27) was passed, which gives the mother most important rights. Sec. 2 makes her on the death of the father the guardian of her infant children, either alone when no guardian has been appointed by the father, or jointly with any guardian appointed by him. Sec. 3 enables her by deed or will to appoint a guardian or guardians to act after her death and that of the father jointly with any guardian appointed by the latter. Sec. 2 further allows her by deed or will to appoint a provisional guardian to act after her death jointly with the father, and after her death, if the father be shown to be unfitted to be the sole guardian of the children, the Court will confirm the appointment. With regard to the rights of the mother under this Act, see *In re A. and B.* (*Infants*), [1897] 1 Ch. 786. (For the Rules of Court relating to proceedings under the Act, see *Annual Practice*, 1898, vol. ii. 328.)

Guardians appointed by the High Court.—For a long period of time before its merger in the High Court the Court of Chancery exercised its jurisdiction for the protection of the person and property of infants. This jurisdiction, it has been said, was conferred on the Court upon the destruction of the Court of Wards. Another explanation is that it is for the sovereign as *parens patriæ* to protect individuals who cannot take care of themselves, and that the authority of the king was exercised by the Chancellor (*Wellesley* v. *Duke of Beaufort*, 1827, 2 Russ. at pp. 20, 21). The powers of the Court of Chancery in relation to the protection of infants are now vested in the High Court and exercised by the Chancery Division (Judicature Act, 1873, ss. 16, 34 (3); Judicature Act, 1875, s. 11).

The Court will not, however, take upon itself the care of an infant, unless there is some property on which it can act, not from any want of jurisdiction, but because it can usefully exercise its jurisdiction only when it has the means of doing so (*Wellesley* v. *Duke of Beaufort*, *ante*). A usual manner of making an infant a ward of Court is to settle some money on the infant, and to bring a suit for its administration.

The fact that the father is alive, or that there is a testamentary guardian, will not prevent an infant being made a ward of Court. A new guardian of the person will not, however, be substituted except when this is necessary for the protection of the infant, and a father's control of his child will not be interfered with except for the strongest reasons, such as his gross immorality or cruelty to the child. (See *In re Agar-Ellis*, 1883, 24 Ch. D.

317.) Where a suit is pending which will enable the Court to take upon itself the management of the infant's property, a guardian of the estate will not usually be appointed (Simpson, *Infants*, 2nd ed., p. 248).

The protection of the Court is not restricted to infants who are wards of the Court, though it is only in the case of its own wards that the Court will make schemes for maintenance or education. In the case also of an infant who is not a ward of Court in the special sense of the word, and who has no property, the Court has power to decide questions of custody, to remove a guardian if his removal be for the benefit of the infant, and to appoint a new guardian in his place (per Kay, J., *Brown* v. *Collins*, 1883, 25 Ch. D. 56, 60; *In re M'Grath*, [1893] 1 Ch. 143).

It used to be considered doubtful whether the Court could altogether remove a testamentary guardian from his office. The doubt is entirely removed by sec. 6 of the Guardianship of Infants Act, 1886, which provides that the Court may, on being satisfied that it is for the welfare of the infant, remove any testamentary guardian, or any guardian appointed or acting by virtue of the Act, and appoint another guardian in his place.

Guardianship is a trust of the highest kind, and the Court will exercise control over all guardians, whether of the person or the estate (Eversley, *Domestic Relations*, 2nd ed., 613–620).

Guardians for Special Purposes.—A guardian may be appointed by the Court, under 4 Geo. IV. c. 76, s. 16, to consent to an infant's marriage, and for various special purposes under different statutes, *e.g.* to consent on behalf of an infant to matters done under the Improvement of Lands Act, 1864, the Limited Owners Residence Act, 1870, the Places of Worship Sites Act, 1873, the Vendors and Purchasers Act, 1874, the Settled Estates Act, 1877.

Foreign Guardians.—A guardian appointed under the law of a foreign country has no direct authority in England. The English Courts, however, recognise the existence of a foreign guardian in the case of an infant within the jurisdiction, who is the subject of a foreign State. (See Simpson, *Infants*, 2nd ed., pp. 251–254; Eversley, *Domestic Relations*, 2nd ed., pp. 607–610.)

Testamentary guardianship under 12 Car. I. c. 24, s. 8, ends, when the ward is a male, at the age of twenty-one unless an earlier termination is provided for by the instrument creating the guardianship (*Selby* v. *Selby*, 1731, 2 Eq. Cas. Abr. 488; *Mendes* v. *Mendes*, 1719, 1 Ves. 89). Whether testamentary guardianship of a female is terminated earlier by her marriage is not free from doubt, but as regards her property it would seem that the guardianship lasts until she is of full age. (See *Roach* v. *Garvan*, 1748, 1 Ves. 157, 160; Eversley, *Domestic Relations*, 2nd ed., pp. 623, 624.) The guardianship of the Court of Chancery, as regards the person as well as the estate, lasts until the ward reaches majority. It is not terminated by the marriage of a female ward (*Roach* v. *Garvan*, *ante*). Guardianship in socage, now practically obsolete, ends when the ward attains the age of fourteen (*Co. Litt.* 89 *a*).

The guardian is entitled to the legal custody of his ward, and for the purpose of obtaining it can sue out a writ of *habeas corpus* (*In re Andrews*, 1873, L. R. 8 Ex. 153): but in the case of a male infant who has reached the age of fourteen, or of a female who has reached the age of sixteen, the Court will not grant the writ against the wish of the infant (*In re Stanahan*, 1852, 20 L. T. 183; *R.* v. *Howe*, 1860, 3 El. & El. 332; *In re Agar-Ellis*, 1883, 24 Ch. D. 317, 326. See also the Custody of Children Act, 1891, secs. 1 and 5 of which declare that the Court may refuse to give the custody of a child to the person entitled to it on the ground of his misconduct). In strict

law the right of the guardian was formerly superior to that of the mother (see, however, 2 & 3 Vict. c. 54, repealed and extended by the Custody of Infants Act, 1873, 36 & 37 Vict. c. 12). As, however, the mother is now a guardian, after the death of the father, by virtue of the Guardianship of Infants Act, 1886, there can be no doubt that unless there be some reason to interfere with her rights, she will be entitled to the custody of her infant children, against a testamentary guardian appointed by the father.

A ward of Court must not be taken out of the jurisdiction without the leave of the Court. Leave will be given when the Court is satisfied that the step is for the benefit of the ward, and that there is sufficient security that future orders will be obeyed (*Elliott* v. *Lambert*, 1884, 28 Ch. D. 156).

It is the duty of the guardian to give his ward an education suitable to the latter's rank and circumstances (per Lord Thurlow, *Powel* v. *Cleaver*, 1789, 2 Bro. C. C. 499, 510). The infant must receive a moral and religious education (per Lord Eldon, *Wellesley* v. *Duke of Beaufort*, 1827, 2 Russ. 21, 29), and, unless under very special circumstances, the religion in which he or she is educated must be the father's (*Hawksworth* v. *Hawksworth*, 1871, L. R. 6 Ch. 539. See PARENT AND CHILD). In the education of the ward the greatest respect should be paid to the wishes of the parents (*Campbell* v. *Mackay*, 1837, 2 Myl. & Cr. 34, 37).

It is also a guardian's duty to maintain his ward in a manner suitable to the latter's condition, but unlike a father he is not bound to maintain the ward at his own expense (Eversley, *Domestic Relations*, 2nd ed., p. 636). When he is in receipt of the ward's income, his duty is to apply as much of it as is necessary to the support of the infant, and to accumulate any surplus.

It may be that the infant is interested in property under a will or settlement in which provision is expressly made for maintenance. Apart from such express provision, the Court has extensive inherent powers of ordering maintenance out of the income of property in which an infant has an interest, and trustees have certain general powers of expending money for the maintenance of a *cestui-que trust* who is incapable of taking care of himself (Simpson, *Infants*, 2nd ed., p. 261; *Nelson* v. *Duncombe*, 1846, 9 Beav. 211, 232). By secs. 42 and 43 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), trustees have also extensive statutory powers of allowing maintenance at their discretion out of property held by them in trust for an infant either for life or for a greater interest, even when the interest is contingent on his attaining the age of twenty-one, or on the occurrence of any event before his attaining that age.

When an infant has a father living who is able to maintain him, the Court will not in general order maintenance, as it is the duty of a father to support his children (*Wellesley* v. *Beaufort*, 1827, 2 Russ. 1, 28). This rule does not extend to the mother (*Douglas* v. *Andrews*, 1849, 12 Beav. 310). The Court will, however, allow maintenance where it has taken away from the father the care and custody of the infant (*Wellesley* v. *Beaufort*, *supra*, and 2 Bli. N. S. 124), where there is a marriage settlement containing a trust for maintenance (*Mundy* v. *Howe*, 1793, 4 Bro. C. C. 223), where the father is not able to support the child in a manner suitable to the latter's expectations (*Buckworth* v. *Buckworth*, 1784, 1 Cox, 80), and sometimes when to refuse maintenance would be a hardship on the other children of the family (*Hoste* v. *Pratt*, 1798, 3 Ves. 730).

The Court sometimes permits maintenance to be charged on real estate or paid out of capital, when the income of the infant's property is insufficient.

(See, for instance, *In re Howarth*, 1873, L. R. 8 Ch. 415, and *In re Welsh*, 1854, 23 L. J. Ch. 344: and cp. *Cadman* v. *Cadman*, 1886, 33 Ch. D. 397.) In general, however, maintenance is only allowed out of the net profits of real estate after the interests on charges have been provided for, and out of the interest of a clear fund of personalty (Simpson, *Infants*, 2nd ed., p. 262).

The Court will grant maintenance when the infant has a present vested interest in the property, though the interest be defeasible by a condition subsequent (Simpson, *Infants*, 2nd ed., pp. 262, 263). Where, on the contrary, payment of a gift is postponed, or a gift is contingent, as a general rule no maintenance can be given; yet in either case the Court has frequently made an exception where the donor is a parent or person *in loco parentis*, on the ground that a parent may be presumed to have intended to give maintenance (*Donovan* v. *Needham*, 1846, 9 Beav. 164; *Wynch* v. *Wynch*, 1788, 1 Cox, 433; *Powys* v. *Mansfield*, 1838, 3 Myl. & Cr. 359; see also the other cases referred to, Simpson, *Infants*, 2nd ed., 266–273). The exception has been made where the gift was to children as a class, as well as where it was to a particular child (*Brown* v. *Temperley*, 1827, 3 Russ. 263). Where a donor has made a provision for a particular family, but has postponed enjoyment, the Court has in a couple of cases allowed maintenance, presuming under the circumstances of the particular gift that the donor did not intend the children to be left unprovided for, or so provided for that they could not be properly educated (*Havelock* v. *Havelock*, 1881, 17 Ch. D. 807; *Collins* v. *Collins*, 1886, 32 Ch. D. 229; cp. *In re Ashford*, 1886, *ibid.* 383).

Maintenance may be given where there are equal gifts, though by a stranger, to a class of children, some of whom must eventually take, though the donor was a stranger. The chances of all to survive and take being equal, the Court will allow maintenance to all out of the fund (*Marshall* v. *Holloway*, 1818, 2 Swans. 436; 19 R. R. 94; Eversley, *Domestic Relations*, 2nd ed., 640). Maintenance may also be granted where there is a contingent gift, whether to a class or to an individual, if the donors over consent (*Greenwell* v. *Greenwell*, 1800, 5 Ves. 194, and the cases reported in the notes to that case; but see 5 R. R. 27).

It is the duty of a guardian to prevent his ward from contracting a marriage unsuitable as regards rank, age, or fortune. Sec. 16 of 4 Geo. IV. c. 76, provides that after the death of an infant's father, the consent of an appointed guardian, or if there be no such guardian, that of the mother, if unmarried, or of a guardian of the person appointed by the Court, must be given; but by sec. 17, if the guardians or mother unreasonably refuse to consent, either of the parties may apply to the Court by petition, and if the marriage appears to be a proper one, the Court may declare it to be so, in which case the declaration is as effectual as if the proper consent had been obtained. Nevertheless, a marriage is valid, though the requirements of the Act have not been observed (*R.* v. *Birmingham*, 1828, 8 Barn. & Cress. 29; 32 R. R. 332). If a marriage take place under 6 & 7 Will. IV. c. 85 by a registrar's certificate, by sec. 10 of that Act the same consent is required as is necessary under the Act of George IV. When the marriage of an infant has by a false oath or by fraud been obtained without the necessary consent, the Court has power to forfeit all the property which the offending party or parties have obtained by the marriage, and to settle the property in the manner directed by the Act (4 Geo. IV. c. 76, s. 23; 6 & 7 Will. IV. c. 85, s. 43).

The leave of the Court must under all circumstances be obtained by anyone desiring to marry one of its wards, and will only be given when the marriage is a suitable one for the ward (Seton, *Decrees*, 5th ed., p. 755).

It is a contempt of Court to marry a ward of Court without such leave, or for a third person to promote such a marriage, and the Court frequently punishes the parties who are guilty of this contempt by committing them to prison (Simpson, 2nd ed., p. 335). The Court will also use its powers to prevent an improper marriage. Thus it will restrain the parties even from communicating with one another (Seton, *Decrees*, 5th ed., pp. 894–897), and when it suspects that a parent or guardian is trying to bring about a marriage without its leave, will remove the ward from his custody, and confide him or her to the care of some other person (*Roach* v. *Garvan*, 1748, 1 Dick. 88).

The Court will, if necessary, make use of its power to commit for contempt, to compel the person marrying its ward to make or agree to a proper settlement (*Ball* v. *Coutts*, 1812, 1 Ves. & Bea. 292; Seton, *Decrees*, 5th ed., 901). Sometimes the settlement has been such as to deprive the husband of any interest in a female ward's property. (See *Kent* v. *Burgess*, 1840, 11 Sim. 361.) The Court has, however, no power to compel its ward to make a settlement because he has been guilty of contempt in marrying without leave (*Leigh* v. *Leigh*, 1888, 40 Ch. D. 290).

An infant has no power to alienate his real estate so as to deprive himself of the right to avoid the transaction (*Co. Litt.* 337 *b*; per Lord Hardwicke, *Hearle* v. *Greenbank*, 1749, 3 Atk. 712), except that when he has reached the age of fifteen he may for valuable consideration sell and convey by feoffment gavelkind land (*In re Maskell and Goldfinch's Contract*, [1895] 2 Ch. 525). The Court has no inherent jurisdiction to order a sale (*Calvert* v. *Godfrey*, 1843, 6 Beav. 97), nor have guardians or trustees of an infant's property any general power of alienation (*Field* v. *Moore*, 1855, 25 L. J. Ch. 66), though trustees may, of course, exercise a power of sale which is given them by the instrument creating the trust.

Extensive powers of dealing with infants' real property have, however, been given by various statutes.

The Partition Acts, 1868 and 1876 (31 & 32 Vict. c. 40, and 39 & 40 Vict. c. 17), enable the Court, in a partition action, to order a sale of land in which an infant is interested.

The Settled Estates Act, 1877 (40 & 41 Vict. c. 18), s. 16, enables the Court to order a sale of any settled estates, which sale may, under Order 51, r. 1 *a*, take place out of Court. Sec. 41 of the Conveyancing and Law of Property Act, 1881, declares that any land in which an infant has an estate in fee-simple or a leasehold interest at a rent, shall be deemed to be a settled estate under the Act.

Further extensive powers of dealing with an infant's real property are given by the Settled Land Act, 1882 (45 & 46 Vict. c. 38). Sec. 59 enacts that where an infant is in his own right seised of or entitled in possession to land, for the purposes of the Act the land is settled land, and the infant is to be deemed tenant for life thereof. By sec. 60 the powers which the Act gives to a tenant for life may be exercised on behalf of the infant by the trustees of the settlement (if any), or by such persons as the Court on the application of the guardian or next friend may direct.

Power to alienate the real property of infants for various special purposes is given to guardians and trustees by various statutes. 41 Geo. III. c. 109, s. 15, enables Inclosure Commissioners, whose powers are now vested in the Board of Agriculture, to effect certain exchanges of lands belonging to infants with the consent of their guardians or trustees. Under the Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18), which is incorporated in a number of other Acts, and authorises the taking of land

for various public purposes, guardians and trustees are empowered to act on behalf of infants (ss. 7, 8, 9). Power is given to sell land belonging to infants for places of worship and burial places (58 Geo. III. c. 45, s. 36; 3 Geo. IV. c. 72, s. 8; 30 & 31 Vict. c. 133, s. 4; 36 & 37 Vict. c. 50, s. 3), for school sites (4 & 5 Vict. c. 38, s. 5), for workhouses (5 & 6 Will. IV. c. 69, s. 1), and for literary and scientific institutions (17 & 18 Vict. c. 112, s. 5). By 10 Geo. IV. c. 50, s. 53, land belonging to infants may be sold to the Commissioners of Woods and Forests.

A lease granted by an infant is, of course, voidable though it becomes binding by acquiescence (*Doe* v. *Smith*, 1758, 2 T. R. 436; *Slator* v. *Trimble*, 1861, 14 Ir. R. C. L. 342).

Neither a testamentary guardian, nor a guardian appointed by the Court and acting with its approval, had power formerly to make a lease which would be binding on an infant after he attained his majority. To remedy the inconvenience that resulted, the Legislature has given extensive powers of leasing. The first Act to be noticed is 11 Geo. IV. and 1 Will. IV. c. 65; sec. 17 of which enables an infant or his guardian, under an order of the Court, to grant a lease, extending beyond the period of minority, of land to which the former is entitled in fee or tail, or absolutely by lease. By virtue of the Settled Estates Act, 1877, the Court has wide powers of granting leases of settled lands (see ss. 4–15, 46, 49), and, as we have seen, by sec. 41 of the Conveyancing and Law of Property Act, 1881, an infant's fee-simple or leasehold land is deemed to be settled estate.

The Settled Land Acts, 1882 and 1890, give a tenant for life very extensive powers of leasing. Under sec. 60 these powers may be exercised in the case of an infant by trustees or by a guardian specially appointed by the Court. By sec. 59 of the Act of 1882 these powers of leasing are extended to land of which an infant is seised in his own right or to which he is entitled in possession.

A guardian of the estate is a trustee, and in the management of the ward's property must strictly carry out the trusts that are imposed on him. He is allowed, in respect of the ward's lands, to expend such sums as are necessary on repairs and improvements, even when not specifically authorised so to do (*Umbleby* v. *Kirk*, 1838, 1 Coop. 254; Lewin on *Trusts*, 9th ed., p. 1101). Extensive powers of management and carrying out improvements are given to trustees of infants' land by secs. 41 and 42 of the Conveyancing and Law of Property Act, 1881, and by secs. 21, 25, and 60 of the Settled Land Act, 1882, and sec. 13 of the Settled Land Act, 1890. (See also the Agricultural Holdings Act, 1883, s. 29, and the Housing of the Working Classes Act, 1885, s. 11.)

In general a guardian of the estate is not entitled to convert the ward's real property into personalty, or personal property into realty, unless there be a trust for conversion. The Court is bound by the same principle, and only sanctions conversion in a case of absolute necessity (*Camden* v. *Murray*, 1880, 16 Ch. D. 161, 171; Lewin on *Trusts*, 9th ed., p. 1100).

It is the duty of a guardian to call in and realise the ward's personal property, and to invest it in securities authorised by the instrument of trust or by law. Order 22, r. 17, specifies the securities in which cash under the control of the Court may be invested. For the securities in which trustees may invest trust funds, see the Trustee Act, 1893, s. 1. Sometimes a will authorises trustees to carry on a business, but in default of such authority they must call in any capital used in trade (*Kirkman* v. *Booth*, 1848, 11 Beav. 273). When it is difficult to call in immediately

money which has been used in trade, a trustee is allowed a reasonable time for the purpose, provided he acts reasonably (*Garrett* v. *Noble*, 1834, 6 Sim. 504).

VIII. The Statutes of Limitation.

The rights of infants are to a great extent not affected by the operation of the Statutes of Limitation. As regards most personal actions, the Statute of James I. provides that the period of limitation does not run against infants (21 Jac. I. c. 16, ss. 3, 7). Under the Statutes of Limitation relating to real property, an action for rent or for the recovery of land can be brought, or an entry or distress made, within six years after the ceasing of any disability specified in the Act, including infancy, notwithstanding that the period of limitation has expired; but the right to sue or make an entry or distress is absolutely barred when thirty years have elapsed since it first accrued. The period of six years runs from the death of a person under disability at the time of his death, notwithstanding the disability of any other person (3 & 4 Will. IV. c. 27, s. 18; 37 & 38 Vict. c. 57, ss. 1, 2, 3, 5, 9). By sec. 42 of the earlier Act only six years' interest on arrears of rent are recoverable; but in equity an infant may treat a person who takes possession of his land as his bailiff, and make him account for all the rents and profits received during his infancy (*Dormen* v. *Fortescue*, 1744, 3 Atk. 124, 130; Simpson, p. 113). When a parent or other person whose duty it is to protect an infant's rights enters into possession of the infant's land, not only is he considered to have possession as bailiff during the infancy, but his possession afterwards is deemed still to be as bailiff, unless he can show that the circumstances under which he holds have changed his possession from one of a fiduciary character. Therefore, however long his possession has continued, in general he is liable to account for the profits received by him, and can gain no prescriptive title to the land (*Thomas* v. *Thomas*, 1855, 2 Kay & J. 79; *Quinton* v. *Frith*, 1868, Ir. R. 2 Eq. 390; *Wall* v. *Stanwick*, 1887, 54 Ch. D. 763; *In re Hobbs*, 1887, 36 Ch. D. 553; *Tinker* v. *Rodwell*, 1893, 9 T. L. R. 657). It seems, however, that this principle does not apply in the case of a stranger who has taken adverse possession of an infant's land (*Hagley* v. *West*, 1824, 3 L. J. O. S. 63; 26 R. R. 221).

As regards legacies and actions on specialty, or for money secured by mortgage or otherwise charged on land, an infant has the full period from attaining his majority to enforce his claims (3 & 4 Will. IV. c. 42, ss. 3, 4; 37 & 38 Vict. c. 57, s. 8).

By sec. 7 of the Prescription Act (2 & 3 Will. IV. c. 71), the time during which any person, who could have resisted a claim under the Act, is an infant is not to be reckoned, except where the claim is declared to be absolute and indefeasible.

[*Authorities.*—In addition to the authorities above mentioned, see Matthews' *Children and Young Persons*, 1895.]

In favorem libertatis—Every presumption is to be made in favour of liberty. This is an important maxim in criminal law, which holds every one innocent until guilt has been established by the prosecution.

Infectious Diseases.—The Public Health Act, 1875, contains numerous provisions with regard to infectious diseases, and the steps to be taken by local authorities for preventing and checking the spread of such

disorders. These authorities are empowered to see that houses and articles infected are properly cleansed and disinfected (ss. 120–123), and to make provision for the conveyance of patients suffering from such diseases to hospitals (ss. 123, 124); they may provide hospitals (s. 131), and must carry out any regulations made by the Local Government Board under the power given to the Board by sec. 134 to make such whenever any part of England appears to be threatened with, or is affected by, any formidable epidemic, endemic, or infectious disease (see EPIDEMIC). Local authorities are also required to make by-laws for common lodging-houses, dealing *inter alia* with the notification of any case of infectious disease occurring therein, and the taking of precautions against the spread of the disease (s. 80).

By the same statute it is made an offence for a person, while suffering from any such disorder, wilfully to expose himself in a public place without taking proper precautions against spreading the disorder, or to enter a public conveyance without notifying the owner, conductor, or driver thereof, that he is so suffering (s. 126). It is also made an offence for a person who being in charge of anyone suffering from such a disorder exposes him in a public place without taking similar precautions (*ibid.*). To expose such a person on the highway is also indictable at common law (*R.* v. *Vantandillo*, 1815, 4 M. & S. 73). A penalty is likewise imposed on a person who gives, lends, sells, transmits, or exposes, without previous disinfection, bedding, clothing, etc., which have been exposed to infection (s. 126). A public conveyance in which a person suffering from any such disorder has been carried must be disinfected immediately afterwards (s. 127); an inn, house, or room in which a person so suffering has been, must previously have been disinfected before being let (s. 128); and it is made an offence for a person to make any false statement with respect to such house or room (s. 129).

Further provision is made on the subject by the Infectious Disease (Notification) Act, 1889, and the Infectious Disease (Prevention) Act, 1890. Both Acts are adoptive; the latter being adoptive either in whole or in part. By the Act of 1889 which defines "infectious disease" for the purpose of the Act as meaning any of the following diseases, namely, smallpox, cholera, diphtheria, membraneous croup, erysipelas, scarlatina or scarlet fever, typhus, typhoid, enteric, relapsing, continued, or puerperal fevers, as well as any other infectious disease which by a resolution duly passed by the local authority and sanctioned by the Local Government Board is declared to be included within the definition (ss. 6, 7). The occurrence of any such disease in any building used for human habitation, or in any ship, boat, tent, van, shed, or similar structure (but not including Crown buildings) must be notified to the medical officer of health of the district (ss. 3, 13, 15), the duty of giving this notice being cast primarily on the head of the house to which the patient belongs, failing whom the nearest relative present, or on his default, on the person in charge of, or in attendance on, the patient, or on his default, on the occupier of the building (s. 3); any medical practitioner visiting such patient is also bound to give notice (*ibid.*).

By the Act of 1890 provision is made for the inspection of dairies, and if necessary for the prohibition of the supply of milk from same where it appears that infectious disease is caused by the consumption of milk supplied therefrom (s. 4). (See also sec. 9 of the Dairies, Cowsheds, and Milkshops Order, 1885.) Provision is also made for the cleansing and disinfecting of premises, bedding, and other articles which have been infected (ss. 5, 6). Penalties are imposed on persons ceasing to occupy

houses or rooms in which within six weeks previously any person suffering from any infectious disease has been, without previously disinfecting same and all articles therein likely to retain infection, or without giving notice to the owner (s. 7). Provision is likewise made for the speedy interment of bodies of persons dying of infectious diseases, and for the disinfection of any public conveyance other than a hearse in which any such body has been carried (ss. 8–11). Orders may be made for the detention of infected persons who are without proper lodging (s. 12), and temporary shelter may be provided for persons compelled to leave their dwellings in order that same may be disinfected (s. 15). Infectious rubbish thrown into ashpits must be disinfected (s. 13).

The main provisions of these statutes have been reproduced in practically identical terms in the Public Health (London) Act, 1891 (ss. 55–74).

The Public Health Act, 1896, empowers the Local Government Board to make regulations providing *inter alia* for signals being hoisted by vessels having any case of epidemic, endemic, or infectious disease on board, for questions to masters, the detention of vessels and persons on board, and the duties to be performed in cases of such disease by masters, pilots, and other persons on board. See EPIDEMIC; HOSPITALS; PUBLIC HEALTH.

Inferior Courts.

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PRELIMINARY.—This expression came into use as a means of contrasting with the superior Courts of common law, Courts also of the common law over which they exercised a supervisory jurisdiction by writs of *mandamus*,

certiorari, or *prohibition*; and since the Judicature Acts, any Court to which these writs will go must be either inferior or ecclesiastical. The CENTRAL CRIMINAL COURT and the Chancery Courts of LANCASTER and DURHAM are treated as superior Courts of local jurisdiction.

Inferior Courts, if of record, have power to fine and imprison for contempts committed in the face of the Court.

Their judges are liable to actions for anything done without jurisdiction. (See Beven on *Negligence*, 2nd ed., 278; *Anderson* v. *Gorrie*, [1895] 1 Q. B. 668; *Jones* v. *German*, [1896] 2 Q. B. 418; [1897] 1 Q. B. 374.)

Inferior fall into four classes—

(1) Courts of criminal jurisdiction.
(2) Courts of civil jurisdiction and record.
(3) University Courts.
(4) Manorial Courts.

1. LOCAL COURTS OF CRIMINAL OR QUASI-CRIMINAL JURISDICTION.

(*a*) *In Boroughs.—Borough Sessions* are the sittings of the recorder or justices of a municipal borough under his or their commission or statutory appointment for judicial or quasi-judicial purposes. From this point of view municipal boroughs, including the city of London (see LONDON (CITY)), fall into three classes—(*a*) those having no separate commission of the peace—of these there were sixty-seven at the end of 1888; (*b*) those which have a separate commission of the peace but not a separate Court of Quarter Sessions. Such grant may on the petition of the council be made by the Crown (45 & 46 Vict. c. 50, s. 162), or by the Crown revoked (51 & 52 Vict. c. 41, s. 38 (7)). Of these boroughs there were 113 at the end of 1888, some of which held their commissions prior to 1835, up till which year most boroughs or towns corporate (whether municipal boroughs in the modern sense or not) had their own justices under their charter or by prescription (see 27 Hen. VIII. c. 24, ss. 5, 14, 15, 17) or the king's commission (27 Hen. VIII. c. 27, ss. 2, 3, 4). The Act of 1835 took away all criminal jurisdiction from corporate or chartered justices, and from the corporations all right to elect or nominate borough justices. (*c*) Quarter Session boroughs which have not only a separate commission of the peace, but also a grant of a separate Court of Quarter Sessions, *i.e.* Quarter Sessions separate from those of the county, though, as in the case of certain liberties of the Cinque Ports, they may not be actually held in the borough (*St. Lawrence, Ramsgate* (*Overseers*) v. *Kent Justices*, 1887, 51 J. P. 262). The grant may on the petition of the council be made by the Crown (45 & 46 Vict. c. 50, s. 162), and can now on like petition be revoked by the Crown (51 & 52 Vict. c. 41, s. 38 (7)), though prior to that enactment revocation could not be effected without legislation (see as to *Falmouth*, 28 & 29 Vict. c. 103). Of these boroughs there were 113 at the end of 1888. Some of these had their grants prior to 1835.

In boroughs of class (*a*) the only justices for the borough are the mayor *ex officio* and any ex-mayor (not disqualified for the office of mayor) during the year after he leaves office (45 & 46 Vict. c. 50, s. 155 (1)). The powers of these justices exist whether they are or are not on the commission of the peace for the county in which the borough lies. But the mayor of a borough which is not a county borough, *i.e.* for administrative purposes a county in itself, is also *ex officio* a county justice if not disqualified (*e.g.* by being sheriff or a solicitor) on taking the oaths under the Local Government Act, 1894 (56 & 57 Vict. c. 73, s. 22). But see 51 & 52 Vict. c. 41, s. 59 (2).

In boroughs of class (*b*), besides the *ex officio* justices already named, the

persons qualified to act under the borough commissions of the peace are the persons named therein who reside in or within seven miles of the borough, or occupy a house, warehouse, or other property therein. They need not be burgesses nor possess the qualification by estate needed for a county justice (45 & 46 Vict. c. 50, s. 157). The stipendiary magistrate, if any, is also a borough justice for all purposes, including liquor licences. See JUSTICE OF THE PEACE; STIPENDIARY MAGISTRATE.

In boroughs of class (*c*) the recorder, besides the persons above named, is a justice of the borough, except for the purposes of granting licences for sale of intoxicants (45 & 46 Vict. c. 50, s. 165 (4)) and of making or levying borough rates, or making, apportioning, allowing, or levying any other rate, though he may hear rating appeals.

In each class of borough the jurisdiction of a borough justice is the same, *i.e.* he has, as to all matters arising within the borough, the same powers as a county justice has as to matters arising within the county. He is not disqualified in any case by liability to the borough rate (45 & 46 Vict. c. 50, ss. 157, 158). No borough justice as such can sit in the county Quarter Sessions or in a Court of assize or gaol delivery, nor act in making or levying a county or borough rate. The recorder is the only borough justice who can do any judicial act at borough Quarter Sessions, though in his absence the mayor may adjourn the sessions (45 & 46 Vict. c. 50, ss. 158, 167). As to their jurisdiction over lunatics, see the Lunacy Acts, 1890 (s. 10) and 1891 (s. 24), and ASYLUMS.

Licensing or Brewster Sessions.—Sessions are also held in boroughs for the confirmation of the grant of new licences, and of the removal of old licences. In boroughs which have at the beginning of the fortnight preceding 20th August (in Middlesex and Surrey, 1st March) ten or more justices acting in or for the borough, the confirming authority is the whole body of borough justices. In boroughs which have less than ten justices then acting, the confirming authority consists of a joint committee of borough justices appointed by the majority of their own body and of county justices appointed by the county licensing committee. Rules are made by the borough justices or the joint committee for the meetings and transaction of business, and as to the proceedings to be adopted for the confirmation of licences, the costs to be incurred, and the person by whom they are to be paid. See 35 & 36 Vict. c. 94, ss. 37, 38, 43, which got rid of the conflicting decisions (*Brown* v. *Nicholson*, 1858, 28 L. J. M. C. 49; *R.* v. *Simpson*, 1861, 30 L. J. M. C. 178). See INTOXICATING LIQUOR.

Petty Sessions.—This term was originally used in contradistinction to General or Quarter Sessions (*R.* v. *London*, 1811, 15 East, 632). By Blackstone it is treated as equivalent to special sessions. The term came into statutory vogue in the eighteenth century (37 Geo. III. c. 143, s. 1). By the Petty Sessions Act, 1848 (12 & 13 Vict. c. 18, s. 1), every sitting and acting of justices of the peace, or of a stipendiary magistrate, in and for any municipal borough (including a city or town corporate) having a separate commission of the peace at a police court or other place appointed in that behalf, is to be deemed a petty sessions of the peace, and the district for which the Court is held is to be deemed a petty sessional division for the purpose of past and future statutes. This legislation was rendered necessary to prevent confusion in the exercise of jurisdiction (*R.* v. *Devon Justices*, 1818, 1 Barn. & Ald. 588; *R.* v. *Whittles*, 1849, 13 Q. B. 254). These definitions have been expanded by the Interpretation Act, 1889 (52 & 53 Vict. c. 63, s. 13), which defines a petty sessional Court as a Court of summary jurisdiction (*a*) consisting (1) of two or more justices, or (2) of a borough police

magistrate (see STIPENDIARY MAGISTRATE) to whom jurisdiction is given, or who is authorised to act under the Summary Jurisdiction Acts (*q.v.*), and whether they or he are or is acting under these Acts or any of them or under any other Act or by virtue of their or his commission, or under the common law; and (*b*) sitting at any petty sessional court-house, *i.e.* a court-house or other place at which justices are accustomed to assemble for holding special or petty sessions, or which is for the time being appointed as a substitute for such court-house or place (52 & 53 Vict. c. 63, s. 13, subs. 11, 12, 13).

These substituted court-houses are distinct from the occasional court-houses which are appointed for the counties under the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49, s. 20).

The result of these definitions is that "petty" sessions is the better understood meaning of the term applied to Courts sitting openly at regular intervals and without special notices to deal with cases where the presence of two justices is necessary, including cases under the Highway Acts (27 & 28 Vict. c. 101, s. 46). They do not apply to cases where a single justice acts under the Indictable Offences Act, 1848, or in the cases in which he can act singly under the Summary Jurisdiction Acts, nor to what are called special sessions, although many sittings of this kind are within the definition of petty sessional Courts above given.

In boroughs of class (*a*) the borough does not form a special petty sessional division, but is part of a county petty sessional division, and the county justices have full jurisdiction to sit and act therein both at petty sessions and at special sessions. The mayor and ex-mayor can sit with the county justices in borough cases, and the mayor is entitled to precedence, except when a borough stipendiary magistrate is sitting. See STIPENDIARY MAGISTRATE.

The mayor and ex-mayor can also sit without the county justices at special sessions, and adjudicate summarily on cases arising within the borough (12 Mon. Circ. 230), but cannot fix the days for them nor appoint a justice's clerk. Either can sit alone for all judicial purposes for which a single justice has jurisdiction (*Strugnell* v. *Wilson*, 1881, 7 Q. B. D. 548). In such cases he acts as a county justice with powers limited to a particular locality (*Mayor of Reigate* v. *Hart*, 1868, L. R. 3 Q. B. 244); but penalties recovered before them under sec. 31 of the Summary Jurisdiction Act, 1868, go to the county treasurer and not to the borough fund (*s. c.*).

Boroughs of class (*b*) form separate petty sessional divisions (12 & 13 Vict. c. 18, s. 1), and the borough justices must appoint a justice's clerk and a proper petty sessional court-house and clerks' office (45 & 46 Vict. c. 50, ss. 159, 160; and see JUSTICES' CLERK). Fines, etc., go to the county and not to the borough fund (*Winn* v. *Mossman*, 1879, L. R. 4 Ex. 292). The county justices have in such a borough, unless it is a county of itself, concurrent jurisdiction with the borough justices (*Buckler* v. *Wilson*, [1896] 1 Q. B. 83), but cannot exclude them if they desire from sitting and acting in a petty sessional Court or other Court of summary jurisdiction sitting on and for a borough case (*R.* v. *Williamson*, 1891, 7 T. L. R. 634). But where the county or borough justices act first the others are excluded from acting (*R.* v. *Sainsbury*, 1791, 4 T. R. 456; 2 R. R. 433).

The provisions as to petty sessions in boroughs of class (*c*) and in boroughs which are counties in themselves are the same as in class (*b*), except that the jurisdiction of the county justices is excluded as to all judicial matters arising within the borough, in all boroughs which before the commencement of the Municipal Corporations Act, 1835 (5 & 6 Will. IV. c. 76), were exempt from such jurisdiction, by an express

non-intromittant clause in their charter or commission, or, it is submitted, by such clause in a commission since granted (45 & 46 Vict. c. 50, ss. 187, 289).

Special Sessions.—Special sessions are sittings of the justices usually convened by previous notice, the giving and length of which is in several cases prescribed by law, or held at fixed intervals throughout the year. The term is used in contrast both to ordinary petty sessions and to General or Quarter Sessions. They are usually held for purposes quasi-judicial in form, but in substance relating to administration or police.

In boroughs having a separate commission of the peace they are held—

(*a*) Between August 20 and September 14, for the granting of licences for alehouses, beerhouses, and wine and refreshment houses (9 Geo. IV. c. 61, ss. 1, 2; 32 & 33 Vict. c. 27; 33 & 34 Vict. c. 29), or for billiard tables (8 & 9 Vict. c. 109, s. 10). The dates are fixed at petty sessions held twenty-one days before that fixed.

(*b*) Not less than four nor more than eight times a year for transfer of the above-mentioned licences. The dates are fixed at the annual licensing meeting (9 Geo. IV. c. 61; 35 & 36 Vict. c. 94).

The scheme of the Local Government Bill, 1888, to transfer the powers exercised at these sessions to town or county councils was abandoned, and has not been revived, but the whole matter is now under the consideration of the Licensing Laws Commission.

(*c*) In the last week of September, to revise jury lists (6 Geo. IV. c. 50, s. 10; 33 & 34 Vict. c. 77, s. 10). This does not apply to Quarter Sessions boroughs.

(*d*) Four times a year at least, to hear appeals against parochial rates (6 & 7 Will. IV. c. 96, s. 6; 12 & 13 Vict. c. 18, s. 1). At these sessions if the borough is not conterminous with the poor law union, for which the rate is made, county justices have concurrent jurisdiction (30 & 31 Vict. c. 106, s. 67; *Buckler* v. *Wilson*, [1896] 1 Q. B. 83).

(*e*) Yearly in October, to appoint special constables for the borough (45 & 46 Vict. c. 50, s. 196 (2)). They have also a power to suspend borough constables (45 & 46 Vict. c. 50, s. 191 (4)).

(*f*) Yearly, between March 24 and April 9, to appoint parochial constables (5 & 6 Vict. c. 109, s. 1; 35 & 36 Vict. c. 92).

(*g*) Yearly, on March 25, or within fourteen days thereafter, to appoint overseers in any borough (54 Geo. III. c. 91) in which the appointment has not been transferred under secs. 33, 34 of the Local Government Act, 1894 (56 & 57 Vict. c. 73).

As a general rule, notice of special sessions must be given to each justice for the borough or division, otherwise they will not be valid (*R.* v. *Worcester Justices*, 1818, 2 Barn. & Ald. 228).

(*h*) To allow rates made by the overseers or other rating authority.

The administrative powers of justices in borough sessions have been transferred to the town councils with respect to the following matters—(*a*) The licensing of dealers in game, passage brokers, emigrant runners, and gang-masters of AGRICULTURAL GANGS; (*b*) the grant of pawnbrokers' certificates; (*c*) the abolition of fairs and markets; (*d*) the execution as the local authority of the Acts relating to petroleum and the protection of infant life (56 & 57 Vict. c. 73, s. 27).

The justices of a borough having a separate commission of the peace are still the authority to grant licences for stage plays (6 & 7 Vict. c. 68, s. 5; 51 & 52 Vict. c. 41, s. 7 (*a*)). The power to grant licences for music and dancing apart from local Acts (as to which, see Pulling, *Handbook for County*

Authorities, pp. 174–177) was transferred in county boroughs to the borough council and in other boroughs to the county council (51 & 52 Vict. c. 41, ss. 3 (*v*), 34, 36); but under (the adoptive) sec. 51 of the Public Health Act, 1890, the jurisdiction can by resolution of the town council be revested in the borough justices. See PUBLIC ENTERTAINMENT.

Quarter Sessions.—No general sessions as distinct from Quarter Sessions are now held in any borough except the city of London (*R.* v. *London Justices*, 1812, 15 East, 632; 13 R. R. 540; and see LONDON (CITY)). In substance Quarter Sessions are merely that species of general sessions of the justices which are held at the particular periods prescribed by statute (see Hawk., P. C., bk. ii. c. 18, s. 18; Lambarde, *Eirenarcha*, lib. iv. c. 20; *R.* v. *Middlesex Justices*, 1843, 4 Q. B. 807), and Acts authorising appeals to general sessions are read as applying in boroughs to Quarter Sessions.

Prior to 1835 corporation justices under the corporations' charters, which had the effect of permanent commissions (*Weatherhead* v. *Drewry*, 1809, 11 East, 168), could hold their General or Quarter Sessions without the assistance of a recorder, and could even try capital offences (*R.* v. *Thomas*, 1815, 4 M. & S. 291; 16 R. R. 520). This power was taken away by the Municipal Corporations Act, 1835, and Courts of Quarter Sessions in all boroughs (except the city of London) are now regulated by secs. 162–169 of the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50). A borough Court of Quarter Sessions is now held before the recorder as sole judge. He must be a barrister of not less than five years' standing, appointed by the Crown (*i.e.* by the Home Secretary), during good behaviour, at such yearly salary as the sovereign directs, not exceeding in the case of a new grant of a Court of Quarter Sessions the amount specified in the petition for the grant. The salary may be increased during the recorder's term of office by resolution of the town council if approved by a Secretary of State. Arrears of salary were, under the Act of 1835, held recoverable only out of the borough fund and not by action of debt (*Addison* v. *Mayor, etc., of Preston*, 1852, 21 L. J. C. P. 108).

The same person may be appointed recorder of two or more boroughs conjointly (45 & 46 Vict. c. 50, s. 163 (8)), and may also lawfully hold the office of County Court judge for the same or another district, subject only to the disapproval of the General Council of the Bar and its constituents.

He may be revising barrister for the borough, but not M.P., mayor, alderman, councillor, or stipendiary magistrate. A recordership does not disqualify the holder from sitting in Parliament, but is an office of profit under the Crown within 6 Anne, c. 41, s. 26, so as to necessitate re-election after accepting the appointment.

Borough Quarter Sessions must be held once in every quarter, or oftener if the recorder thinks fit because of the number of prisoners committed for trial before him, or in view of the Assizes Relief Act, 1889 (52 & 53 Vict. c. 18). They may be held during the assizes for the county of which the borough forms part (*Smith* v. *R.*, 1849, 18 L. J. M. C. 107).

The recorder, if unable to attend from sickness or other unavoidable cause, may appoint by writing, signed by him as a deputy-recorder, a barrister of five years' standing to hold the next sessions for him (45 & 46 Vict. c. 50, s. 166). If the recorder is unable to make the appointment, it can be made under the Recorders, Magistrates, and Clerks of the Peace Act, 1888 (51 & 52 Vict. c. 23). The inadequacy of the recorder's excuse for absence does not invalidate the acts of his deputy (45 & 46 Vict. c. 50, ss. 166, 237), who apparently need not take any oath of office.

When the sessions are likely to last over three days, and he receives a

certificate signed by the mayor, two aldermen, or the town clerk of a resolution of the town council (which remains in force for twelve months) as to its expediency, the recorder has power to constitute a second Court and to appoint a barrister of five years' standing, previously approved as a fit person by a Secretary of State, to preside over a second Court during the sessions, and try all felonies and misdemeanours sent in to him by the recorder or deputy-recorder (45 & 46 Vict. c. 50, s. 168). This reserves appeals, etc., to the recorder or his deputy in the first Court. Ancillary provisions are made as to appointing an assistant clerk of the peace and crier of the Court, and for the payment of the assistant barrister and these officers (45 & 46 Vict. c. 50, s. 168 (5) (8), Scheds. 4, 5).

The mayor and other borough justices have no judicial authority in a Borough Court of Quarter Sessions; but the mayor, if the recorder or his deputy are absent, can open and adjourn the Court, and respite recognisance, condition to appear thereat until a day by him then and there proclaimed (45 & 46 Vict. c. 50, ss. 158, 167).

The clerk of the peace for the borough is appointed by the town council (45 & 46 Vict. c. 50, s. 164). See PEACE, THE.

The jurisdiction of the Borough Quarter Sessions is the same as to matters arising within the borough as that of County Quarter Sessions as to matters arising within the county, except that the recorder or his deputy act alone (45 & 46 Vict. c. 50, s. 165 (3)). He can try all felonies and misdemeanours within the jurisdiction of Quarter Sessions, and has power to state a special case under the Crown Cases Reserved Act, 1848 (11 & 12 Vict. c. 78). He also has exclusive jurisdiction to hear any appeals from acts of borough justices which lie to Quarter Sessions, whether under the Summary Jurisdiction Acts, the Poor Law Acts (see 8 & 9 Will. IV. c. 36, s. 6), or as to stage play licences (6 & 7 Vict. c. 68, s. 20); and as to these appeals he appears to have exclusive jurisdiction (see *R.* v. *St. Edmunds, Salisbury*, 1841, 2 Q. B. 72; *R.* v. *Suffolk Justices*, 1841, 2 Q. B. 85; *R.* v. *Lancashire Justices*, 1852, 18 Q. B. 361; *R.* v. *Liverpool Justices*, 1850, 15 Q. B. 1070). But he is in terms forbidden to deal with appeals as to grants of licences to sell intoxicants; and these, even in a Quarter Sessions borough, are heard by the justices of the county in which it lies (45 & 46 Vict. c. 50, s. 165 (4)) (*R.* v. *Deane*, 1841, 10 L. J. M. C. 126; *R.* v. *Recorder of Bristol*, 1854, 24 L. J. M. C. 43). He may take any part in the allowance, making, apportionment, or levy of a borough rate, or, except as to appeals, any rate whatsoever, and he has, under sec. 198 (3), jurisdiction to hear certain appeals about the watch rate (see 11 & 12 Vict. c. 31, s. 9). The jurisdiction of county justices to try felonies and misdemeanours committed in a borough appears to be concurrent with that of the recorder (45 & 46 Vict. c. 50, s. 154), unless the borough is a county in itself (1 Black. *Com.* 119), or the county justices were before 1835 excluded by a *non-intromittant* clause in the municipal charter or commission (*Talbot* v. *Hubble*, 1741, 2 Str. 1154; *R.* v. *Sainsbury*, 1791, 4 T. R. 451; *Ware* v. *Clerk of Peace for Devon*, 1865, 35 L. J. M. C. 47), or in the grant after 1835 of a Court of Quarter Sessions. At present twelve Quarter Sessions boroughs are counties of (cathedral) cities, namely, Bristol, Canterbury, Chester, Exeter, Gloucester, Lichfield, Lincoln, London, Newcastle-upon-Tyne, Worcester, and York; and seven are counties of towns, namely, Berwick-on-Tweed (5 & 6 Will. IV. c. 76, s. 109), Carmarthen, Haverfordwest (during Royal pleasure by 34 & 35 Hen. VIII. c. 26, s. 61), Kingston-upon-Hull, Nottingham, Poole, and Southampton. Until 1842 (5 & 6 Vict. c. 110) Coventry was also a county of a city. With the exceptions named, the franchises and immunities of

these places rest on charter. These boroughs are held to be "counties" within Acts giving jurisdiction to county justices (*R.* v. *Pearce*, 1880, 5 Q. B. D. 386; *R.* v. *St. Maurice, York* (*Inhabitants*), 1851, 16 Q. B. 908).

The law as to defraying the expenses of criminal justice as to cases arising in boroughs is somewhat complicated. These expenses are described in the Local Government Act, 1888, as the costs of assizes and of Quarter and Petty Sessions. They include (s. 100) the costs of maintaining and providing the courts and offices and the judges' lodgings, the salaries and remuneration of a recorder, clerks of assize, clerks of the peace, clerks of the justices, and other officers, the costs of the jury lists, the costs of rewards ordered to be paid by the Court, the costs of prosecutions, including those of the defendant's witnesses (under 30 & 31 Vict. c. 35, s. 5), and all other costs incidental to assizes, Quarter and Petty Sessions.

County boroughs in which no separate commission of oyer and terminer and gaol delivery is directed to be executed have to contribute to the costs of the assizes for the county at large (51 & 52 Vict. c. 41, s. 32 (3) (*a*)); and if they are not Quarter Sessions boroughs must also contribute to the cost of the county Quarter and Petty Sessions, subject to a right to redeem their liability on the grant of separate Quarter Sessions (51 & 52 Vict. c. 41, ss. 32 (3) (*b*), 100).

If they are Quarter Sessions boroughs they pay their own expenses of Quarter and Petty Sessions, and contribute to the costs of assizes only as to the expenses of prosecuting prisoners committed from the borough, in which case the expenses are paid by the borough treasurer and recouped to him out of the borough fund (45 & 46 Vict. c. 50, s. 169; 51 & 52 Vict. c. 50, ss. 67, 100).

In Quarter Sessions boroughs (whether counties of cities or not) which are not county boroughs, but had a population of 10,000 by the census of 1881, the costs of assizes are paid out of the county fund, and the parishes of the borough are liable to county contributions, but not to a separate borough rate, for these expenses; and the borough is released from its separate liability under sec. 169 of the Municipal Corporations Act, 1882, to pay the expenses of borough cases tried at the county assizes (51 & 52 Vict. c. 41, s. 35 (5) (8)). The expenses of Quarter and Petty Sessions seem to be payable out of the borough fund (51 & 52 Vict. c. 41, s. 35 (2); *Dover* case, [1891] 1 Q. B. 389).

In boroughs which have a population under 10,000, whether they are or are not Quarter Sessions boroughs or counties in themselves, the expenses of assizes and Quarter and Petty Sessions are paid out of county funds, to which they must contribute. Where the grant of a separate commission of the peace or Quarter Sessions is revoked, these boroughs fall into the county for purposes of Quarter and Petty Sessions (51 & 52 Vict. c. 41, s. 38 (7) (8); *Sandwich* case, [1891] 1 Q. B. 386; *Truro* case, 1894, 63 L. J. M. C. 60; *Leominster* case, [1895] 1 Q. B. 43). But this case has been dissented from in the *Thetford* case, 1897, 14 T. L. R. 97, so far as relates to the salaries of the recorder and clerk of the peace, and costs of Quarter Sessions.

The fines, forfeitures, and fees collected by the clerk to the justices, unless they are in revenue cases or subject to a particular statutory direction, are in county boroughs and Quarter Sessions boroughs having a population over 10,000 paid into the borough fund (45 & 46 Vict. c. 50, s. 221), and in other boroughs are paid to the county fund (*Winn* v. *Mossman*, 1879, L. R. 4 Ex. 292; *Leominster* case, [1895] 1 Q. B. 43). Fines, forfeitures, and estreats in Courts of assize or Quarter Sessions are governed by the Levy of Fines Acts, 1823 and 1824 (see 45 & 46 Vict. c. 50, s. 222),

and seem to go to the Exchequer, unless granted by charter or otherwise to the borough fund. A controversy on the subject of estreats at assizes has just been decided between the county borough of Nottingham and the Treasury, in which the nature and limits of borough privileges has been considered (*A.-G.* v. *Nottingham*, 1897, 66 L. J. Q. B. 883).

(*b*) *In Counties.*—The arrangements of the counties for brewster sessions, special sessions, and petty sessions do not differ materially from those in boroughs, except that the county is divided into a number of petty sessional divisions. (See INTOXICATING LIQUOR; PETTY SESSIONS; SUMMARY JURISDICTION.)

County Quarter Sessions are held before two at least of the justices named in the county commission. As to their powers and procedure, see QUARTER SESSIONS.

2. LOCAL CIVIL COURTS OF RECORD.

Besides the COUNTY COURTS there are still in certain municipal boroughs and areas, borough civil Courts, *i.e.* inferior local Courts of Record, for the trial of civil actions, which by charter, custom, or otherwise are or ought to be held in the borough (45 & 46 Vict. c. 50, s. 7 (1)). The condition of these Courts was considered by the Municipal Borough Commissioners in their report of 1835, and an analytical table, showing 115 Courts as then existing, is given in the report (Parl. Pap. 1835, vol. 443, p. 358). They were not destroyed by that Act; in fact their jurisdiction was extended (5 & 6 Will. IV. c. 76, ss. 28, 118; 7 Will. IV. and 1 Vict. c. 78).

Prior to the passing of the County Courts Act, 1846 (9 & 10 Vict. c. 95), there were many Courts for the recovery of small debts established under different local Acts. These Courts, of which a long list is scheduled to the Act, were abolished by Orders in Council dated March 9 and April 24, 1847 (4 Statutory Rules and Orders, Revised, pp. 166–169).

Under the Common Law Procedure Acts, power was given to apply the Acts, and the rules made thereunder, to local Courts of Record (15 & 16 Vict. c. 76, s. 228; 17 & 18 Vict. c. 125, s. 105; 18 & 19 Vict. c. 67, s. 9; 23 & 24 Vict. c. 126, s. 44). In 1871 the Judicature Commissioners reported in favour of the abolition of all local Courts of Record (Parl. Pap. 1872, C. 631), but thus far without any action being taken, though in 1888 further returns were made (Parl. Pap. 1888, C. 187), which showed the increased disuse of the Courts. Under the Borough and Local Courts of Record Act, 1872 (35 & 36 Vict. c. 86), power was given to make Orders in Council extending to local Courts of Record the provisions of 1 & 2 Will. IV. c. 58 (now repealed), as to interpleader and the procedure provisions scheduled to the Act of 1872 (s. 2), and to direct the service in England and Wales outside the local jurisdiction of the Court of any writ or process issued by it (s. 3). The statute also empowered the concurrent sitting of such Courts in two divisions (s. 4), the appointment by the judge of a deputy, being a barrister of not under seven years' standing (s. 7), and the enforcement of writs of execution through County Court bailiffs (s. 6).

Under the Judicature Acts further steps were taken to improve the procedure and jurisdiction of these Courts. The new rules of law thereby enacted as to the Supreme Court are applied to such Courts (36 & 37 Vict. c. 76, ss. 25, 91; 38 & 39 Vict. c. 77, ss. 1, 10); and they are empowered to deal with counter-claims as to certain matters not within the original jurisdiction of the Court (36 & 37 Vict. c. 66, s. 90; 47 & 48 Vict. c. 61, s. 18). Power is given to extend their equity and admiralty jurisdiction by Order in Council (36 & 37 Vict. c. 66, ss. 88, 89); and all personal actions

in the Court must now be begun by writ of summons (45 & 46 Vict. c. 50, s. 181).

Under the Civil Procedure, etc., Act, 1883 (46 & 47 Vict. c. 49, s. 8), any of the provisions of the Judicature Acts, or the rules made thereunder, may be extended to any such Court by Order in Council in substitution for those of the Common Law Procedure Acts; and any power of the judges of such Courts by statute (45 & 46 Vict. c. 50, s. 182), charter, or otherwise to make rules or orders as to procedure, fees, or costs must now be exercised with the concurrence of the Rule Committee of the Supreme Court (47 & 48 Vict. c. 61, s. 24). This to some extent seems to supersede the provisions of sec. 102 (3) of the Municipal Corporations Act, 1882.

The judges, officers, and sittings of borough civil Courts are subject to the particular provisions of local Acts, regulated by secs. 175–185 of the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50). Every judge or assessor of the Court, other than the mayor, holds office during good behaviour (s. 177). The recorder, if any, is the judge, unless it is otherwise provided by a local Act, or a barrister of five years' standing acted as judge or assessor at the passing of the Municipal Corporations Act, 1835, s. 175 (1). Where there is no recorder, such officer as by charter or custom may sit as judge is to be appointed by the town council (s. 176). The town clerk or such officer as the council appoints is registrar; but, if a solicitor, is subject to limitations as to directly or indirectly practising before the Court (s. 179 (1)). Minor officers are appointed by the town council (s. 178 (2)). The district over which the Court has jurisdiction under its charter does not always correspond with that of the borough Quarter Sessions, but can be made to do so by Order in Council (s. 185).

The sittings of the Court must be held for trials of issues of fact at least four times yearly, with no greater interval than four months between successive Courts; and, subject as aforesaid, where the recorder is judge, at such time as he directs or a Secretary of State orders (s. 180).

These Courts do not cease to exist by disuse, and may be compelled by mandamus to hold sittings (*R.* v. *Mayor, etc., of Hastings*, 1822, 1 Dow. & Ry. M. C. 148; 24 R. R. 657; *R.* v. *Mayor, etc., of Wells*, 1836, 4 Dowl. P. C. 562).

The recorder if ill or unavoidably absent can appoint as his deputy for his next Court, a barrister of five years' standing, but must report his reasons for the appointment to the Home Secretary (s. 175 (2) (3)). The appointment is subject to regulations made by Order in Council of June 26, 1873 (4 St. R. & O., Revised, 170). If the recorder is unable to appoint, then a deputy can be appointed under the Recorders, etc., Act, 1888 (51 & 52 Vict. c. 23). Provision is also made for dealing with interlocutory business and affidavits in the absence of the recorder (1882, s. 175 (6) (7)).

The remuneration of the recorder or his deputy is fixed by by-law or resolution of the town council (s. 175 (5), Sched. V. Pt. I. r. 1); which also, subject to the approval of the Home Office, may fix and must post up the fees to be taken by the registrar and other officers (ss. 178 (3), 234), where the fees are not prescribed under the Borough and Local Courts of Record Act, 1872.

In places which are not municipal boroughs (except the City of London and the Cinque Ports) the jurisdiction of local Courts of Record was abolished by the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 181, ss. 2, 13), on the report of the Commissioners of 1876 (Parl. Pap. 1880, vol. xxxi. p. 1).

The following borough Courts of Record seem to be still in existence; but as disuse or abeyance, however long, does not destroy such a Court, the list cannot be treated as exhaustive. And attempts are made from time to time to revive such Courts where it is believed that they will be more convenient or satisfactory than the County Court. In most cases their origin and ancient constitution is dealt with in the Municipal Corporations Report of 1835. Those marked with a * are included in the returns appended to the Judicial Statistics for 1896 (Parl. Pap. 1896 (8263), p. 222) as having heard actions in 1896.

There is great uncertainty as to the right and mode of appeal from these Courts. The only authoritative statement on the subject is contained in a parliamentary return of 1888 (Parl. Pap. 1888, C. 187).

Alston Moor Court Baron.—This Court is the Court Baron and Customary Court of the Lords of the Admiralty or Lords of the Manor of Alston Moor in Cumberland. See GREENWICH HOSPITAL. It had jurisdiction up to £2 in debt, and as to damage done by working mines and minerals in the manor (Parl. Pap. 1888, C. 187). No cause has been tried for over fifteen years (Parl. Pap. 1896, C. 8263, p. 119).

The Birmingham Borough Court.—This Court was created by the Municipal Charter of the borough (October 31, 1838). Its jurisdiction was excluded as to all cases within the jurisdiction of the County Court by Order in Council of 29th December 1853 (4 St. R. & O., Revised, 173). And it has been virtually superseded by the County Court.

* *The Bristol Courts of Tolzey and Pie Poudre.*—These Courts are regulated by Orders in Council of 1871, 1873, 1883, and 1890 (St. R. & O., 1891, p. 715; St. R. & O., Revised, vol. iv.; Mun. Corp. Rep. 1835, vol. ii. p. 1173, vol. iv. p. 2192). There is no appeal from these Courts. They are held by the recorder. See CONCESSIT SOLVERE.

The Cambridge Court of Pleas (Mun. Corp. Rep. 1835, vol. iv. p. 2193).—Portions of the Common Law Procedure Acts and Rules, 1855, and the Summary Procedure or Bills of Exchange Act, 1855, were extended to this Court by Orders in Council in 1854 and 1855 (4 St. R. & O., Revised, 181–184).

The Chester Courts of Pentice and Portmote (see Mun. Corp. Rep. 1835, vol. iv. p. 2624).—Its Admiralty jurisdiction was abolished in 1835 (5 & 6 Will. IV. c. 76, s. 108). The procedure of this Court is regulated by Order in Council of 6th July 1870, under the Common Law Procedure Acts, and by rules and regulations, made May 17, 1870, by the judge of the Court, with the approval of three judges of the common law Courts (printed in 4 St. R. & O., Revised, 184–207).

The Cinque Ports Admiralty Court.—Its jurisdiction was regulated by 1 & 2 Geo. IV. c. 76, and 12 Anne, st. 2, c. 18, and saved by sec. 13 of the Municipal Corporations Act, 1883. The procedure of the Court is regulated by rules made in 1891 (St. R. & O. 1896, pp. 609-703).

* *The City of London Court.*—See LONDON (CITY).

Clitheroe Borough Court of Pleas (Mun. Corp. Rep. 1835, vol. ii. pp. 1483, 1486) is a Court of Record of civil jurisdiction of unlimited amount. It has fallen into disuse, and no process has issued since 1865 (Parl. Pap. 1896, C. 8263, p. 119).

The Colchester Law and Hundred Courts.—Their procedure is regulated by Orders in Council of 1853, 1855, and 1857 (printed in 4 St. R. & O., Revised, 208–210). Appeals lie under 36 & 37 Vict. c. 66, s. 45.

Cornwall and Devon Stannaries Courts.—These Courts were abolished in 1896, and their jurisdiction transferred to the County Courts (59 & 60 Vict. c. 45).

* *The Derby Borough Court of Record* (Mun. Corp. Rep. 1835, vol. iii. p. 1851).—Its procedure and fees are regulated by Orders in Council of 1860, and rules made June 17, 1861 (printed in 4 St. R. & O., Revised, pp. 211–221). It has jurisdiction to an unlimited amount, subject to appeal to the High Court.

Derbyshire Barmote Court.—See BARMOTE COURT.

* *The Exeter Provost Court* (Mun. Corp. Rep. 1835, vol. i. p. 490).—Its procedure is regulated by an Order in Council of May 12, 1874, which applies the Borough, etc., Courts Act of 1872 (printed in 4 St. R. & O., Revised, 221). (See also Parl. Pap. 1872, C. 631, vol. i. p. 306.) Foreign attachment can be used in the Court.

* *The Great Yarmouth Borough Court* is an ancient Court existing by custom and charter (Blomfield and Parker, *Hist. Norfolk*, 1775, vol. v. pp. 1638, 1645). It is now regulated by Orders in Council of 1856 and 1874, printed in Statutory Rules and Orders, Revised, vol. iv. pp. 224–228. A prosecution for forgery of its process took place in 1897.

The Ipswich Court of Small Pleas (Mun. Corp. Rep. 1835, vol. iv. p. 2316).—Its procedure is regulated by Orders in Council of 1858, one of which excludes its jurisdiction in cases within County Court jurisdiction (printed in 4 St. R. & O., Revised, 228–230).

The Kidwelly Local Court, which was manorial, was surrendered in 1866, under the County Courts Act, 1846 (see 4 St. R. & O., Revised, 169, 170).

* *The Kingston-upon-Hull Court of Record or Venire Court* (Mun. Corp. Rep., 1835, vol. iii. p. 1557).—Its procedure is regulated by Orders in Council of 1852 and 1873, and by rules made by the judge in 1852, 1853, and 1857 (printed in 4 St. R. & O., Revised, 230–238). Unsuccessful attempts have been made to get new rules approved by the Lord Chancellor and judges.

The Lancaster Borough Court of Pleas (Mun. Corp. Rep., 1835, vol. iii. p. 1607).—No proceedings have been taken for over fifteen years (Parl. Pap. 1896, C. 8263, p. 119). It is distinct from the Lancaster Court of Pleas, which was merged in the High Court by the Judicature Act, 1873 (36 & 37 Vict. c. 66, ss. 16, 77, 78, 92).

* *The Liverpool Court of Passage.*—See PASSAGE, COURT OF. It is subject to Orders in Council of 1854 and 1856 (4 St. R. & O., Revised, 954–956).

* *The Mayor's Court of London.*—See LONDON (CITY).

The Newark Borough Court of Record (Mun. Corp. Rep. 1835, vol. iii. p. 1937).—Its procedure is regulated by rules made in 1837 (printed in 4 St. R. & O., Revised, 239–248). No cases have been entered since 1882.

* *The Newcastle-upon-Tyne Burgess and Non-Burgess Courts of Record* (Mun. Corp. Rep. 1835, vol. iii. pp. 1648, 1937).—The jurisdiction was extended to Gateshead by Order in Council about 1851. They are held before the recorder for trial of issues, and three days a week for other matters before his deputy (Parl. Pap. 1872, C. 631, p. 260). The procedure is regulated by rules made in 1871, and printed in Statutory Rules and Orders, Revised, vol. iv. pp. 249–253.

* *The Northampton Court of Record* (Mun. Corp. Rep., 1835, vol. iii. p. 1970).—It has jurisdiction in personal actions unlimited in amount. Its procedure is regulated by Orders in Council made in 1853, 1854, and 1855 (printed in 4 St. R. & O., Revised, 254, 255).

* *The Norwich Guildhall Court* (Mun. Corp. Rep. 1835, vol. iv. p. 2467).—Its procedure is regulated by Orders in Council of 1854, 1857, and 1873 (printed in 4 St. R. & O., Revised, 255–258). Its jurisdiction in all actions

is limited locally but not in amount. There is no appeal. The recorder is not the judge.

The Nottingham Borough Court of Record (Mun. Corp. Rep. 1835, vol. iii. p. 1994).—The jurisdiction of this Court was, in 1858, taken away as to all cases within County Court jurisdiction (4 St. R. & O., Revised, 258).

The Oswestry Court of Record has jurisdiction in personal actions, without limit of amount as to causes of action arising within the borough (Mun. Corp. Rep. vol. iv. p. 2829).

The Oxford Mayor's Court had customary jurisdiction over all personal actions arising in the city, without limit of amount (Mun. Corp. Rep. vol. i. p. 239). It has fallen out of use since the establishment of County Courts.

The Peterborough Court of Common Pleas seems to have been the old *Curia de Portman mote*, held by the steward of the Dean and Chapter weekly for all personal and mixed actions (Bridges and Whalley, *Hist. Northamptonshire*, vol. ii. p. 537). It has fallen into disuse.

Plymouth Borough Court. — This Court has fallen into disuse. An attempt to resuscitate it in 1897 fell through, owing to the difficulties made by the Lord Chancellor as to sanctioning new rules. See 32 L. J. N. 529.

The Pontefract Burgess and Foreign Court of Record had jurisdiction as to all actions arising in the borough (Mun. Corp. Rep. 1835, vol. iii. p. 167). It has fallen into disuse since 1833.

The Poole Civil Court of Record (Mun. Corp. Rep. 1835, vol. ii. p. 1322).—Its procedure is regulated by Orders in Council of 1858 and 1873 (4 St. R. & O., Revised, 259–261).

The Portsmouth Court (Mun. Corp. Rep. 1835, vol. ii. p. 812) has not been held for over fifteen years (Parl. Pap. 1896, C. 8263, p. 119).

* *The Preston Court of Pleas* (Mun. Corp. Rep. 1835, vol. iii. p. 1691).—Its procedure is regulated by Order in Council of September 13, 1854 (4 St. R. & O., Revised, 261); as to the payment of the judge, see *Addison* v. *Mayor, etc., of Preston*, 1852, 21 L. J. C. P. 146.

* *The Ramsey Court of Pleas* (Mun. Corp. Rep. 1835, vol. ii. p. 1332) is a Court of Record held for the liberty of Ramsey in Hants, before the steward of the lord (Parl. Pap. 1888, C. 187). Its jurisdiction is unlimited, except by local boundaries. There is no appeal, and the procedure has not been altered to correspond with that under the Common Law Procedure Acts or the Judicature Acts (Parl. Pap. 1888, C. 187).

* *The Salford Hundred Court* is regulated by special Act (31 & 32 Vict. c. cxxx.), and by a series of Orders in Council for 1855 to 1893 (see 4 St. R. & O., Revised, 262–273, and St. R. & O. 1893, 417–419).

* *The Scarborough Court of Pleas* (Mun. Corp. Rep. 1835, vol. iii. p. 1720).—This Court is regulated by Orders in Council of 1859, 1862, and 1873 (4 St. R. & O., Revised, 273–276).

The Shrewsbury Court of Record (Mun. Corp. Rep. 1835, vol. iv. p. 2017) has not been held since 1879. Its records have been destroyed by a fire in the Guildhall.

The Southwark Court of Record.—See LONDON (CITY).

The Worcester Court of Pleas, 1554, by charter (Mun. Corp. Rep. 1835, vol. i. p. 156). It fell into disuse in 1865. A report on its history and procedure was made by the town clerk in 1889, and the Court was resuscitated in 1894, after a decision of the Q. B. D. (*R.* v. *Worcester*, unreported) that the recorder was the proper judge, and is held four times a year before the recorder. It is regulated by three Orders in Council of 1856 (St. R. & O., Revised, vol. iv. pp. 276–279). New rules which would increase the utility of the Court have been prepared, but are not yet sanctioned.

The York Court of Record (Mun. Corp. Rep. 1835, vol. iii. p. 1747).—This Court is regulated by Orders in Council of 1854, 1873 (4 St. R. & O., Revised, 279–281), 1890 (St. R. & O. 1890, p. 728).

3. University Courts.

The Universities both of Oxford and Cambridge have long enjoyed special jurisdictions of various kinds; partly in consequence of their Chancellors having originally derived their authority from the Bishops of Lincoln and Ely respectively; partly under a long series of Royal charters, confirmed by the Act of 13 Elizabeth, c. xxix. Of the Cambridge privileges, so little has survived the "Cambridge Award Act" of 1856, 19 & 20 Vict. c. xvii., that it may be sufficient here to give some account of the large measure of exclusive jurisdiction now or formerly exercised in matters (1) ecclesiastical, (2) criminal, (3) civil, when a member of the university is concerned, by the several Courts at Oxford.

I. The Court of the Chancellor.

(1) The ecclesiastical jurisdiction would appear now to be obsolete (see the judgment of the assessor in *Pusey* v. *Jowett*, Ann. Register, 1863); and the right to probate of wills, finally established, as against the Archdeacon of Oxford, in 1345, was taken away by 23 & 24 Vict. c. 91; which, however, left to the university the custody of wills already proved (see Index to Wills, etc., 1436–1814, J. Griffiths, 1862).

(2) The criminal jurisdiction intrusted to the Court, except in cases of felony and mayhem, by the charters from 1290 downwards, would seem, in view of the Summary Jurisdiction Acts, to be no longer exercisable.

(3) The civil jurisdiction of the Court, which dates from 1244 and is still in active exercise, is exclusive, unlimited in amount, and extends to all causes of action, which do not relate to freehold, and in which the Court can do justice, arising in any part of England. The superior Courts have frequently had occasion to support this jurisdiction, and to define its scope, most recently in *Ginnett* v. *Whittingham*, 1886, 16 Q. B. D. 769. As to scholars as plaintiffs, see *Hayes* v. *Long*, 2 Wils. 311; as to the equitable powers of the Court, *Aldrich* v. *Stratford*, 22 Vin. *Abr.* 11, pl. 13. Cp. Grant, *Corporations*, pp. 520–527.

Down to the year 1854, the Court administered a modernised form of the civil law, but since 17 & 18 Vict. c. 81, it has administered the common law; and its practice is governed by bodies of rules, issued, under 25 & 26 Vict. c. 26, and 47 & 48 Vict. c. 61, by the Vice-Chancellor, with the approval of the Rule Committee of the judges. The appeal, which formerly lay, somewhat as in other Courts of the civil law, through two inferior bodies of delegates, to delegates appointed under the Great Seal, is now, by Order in Council of 1894, made in pursuance of the Judicature Act, 1875, and the S. L. R. and Civil Proc. Act, 1883, to the High Court. The officers of the Court, under the Vice-Chancellor, are the judge ("assessor"), who must be a barrister; the registrar, who must be a solicitor; and a variable number of "proctors," who must also be solicitors. The records of the Court are preserved, with few *lacunæ*, from 1434 to the present day.

II. To deal with cases of felony and mayhem committed by scholars, which had been excepted from the jurisdiction of the Chancellor, a new Court was created by charter of 7 Hen. IV., that of the High Steward, who, with the licence of the Lord Chancellor, may impannel a mixed jury of scholars and citizens, and try even capital cases. This Court does not seem to have sat for more than two centuries, nor is it likely again to receive the authorisation necessary to call it into existence.

III. The Chancellor, Vice-Chancellor, and the deputy of the latter, are, by charter of 14 Hen. VIII., justices of the peace for Oxford, Oxfordshire, and Berks, where scholars are concerned. The Vice-Chancellor has always exercised this jurisdiction, and his so doing under the Summary Jurisdiction Acts has been facilitated by 49 & 50 Vict. c. 31.

[*Authorities.*—The charters and the Act of Elizabeth in the *Registrum Privilegiorum Almæ Universitatis Oxoniensis*, Oxon., 1770; *Statuta Universitatis Oxoniensis*, Oxon., 1897, tit. xxi.]

4. MANORIAL COURTS.

These, so far as still extant, are dealt with under MANOR. A question is now pending as to whether exercise of their jurisdiction in accordance with law or custom can be compelled by *mandamus*. See *Ex parte Page*, 1897, 14 T. L. R. 34, 61. Anciently wrong judgments of such Courts, if not of record, were reviewed by writs of FALSE *Judgment*.

Informant is the term used to describe a person by whom an information is laid to recover a penalty imposed by statute when it is recoverable by criminal or quasi-criminal proceedings (see INFORMATIONS). In the case of summary proceedings before justices it is contrasted with complainant, a person who lays a complaint for penalties, etc., recoverable as civil debts.

In formâ pauperis.—A suitor, who from poverty is unable to avail himself of the ordinary forms of the Court, has, from a very early period in the history of our law, been entitled, upon satisfying the Court of his want of means, to obtain an order for leave to sue *in formâ pauperis*. Such order conferred on the pauper the right to have a counsel and solicitor assigned to him without fee or reward, coupled with immunity from payment of the ordinary fees of the Court.

This common law right was affirmed by the Statute 11 Hen. VII. c. 12, entitled "A mean to help and speed poor persons in their suits" (per Tindal, C.J., *Brunt* v. *Wardle*, 1841, 3 Man. & G. 534). By that statute it was enacted that "every poor person or persons, which have, or hereafter shall have, cause of action against any person or persons within this realm, shall have by the discretion of the chancellor of this realm, writ or writs original and writs of *subpœna*, according to the nature of their causes, therefore nothing paying to your highness for the seals of the same, nor to any person for the writing of the same writs to be hereafter sued; and that the said chancellor for the time being shall assign such of the clerks, which shall do and use the making and writing of the same writs, to write the same ready to be sealed; and also learned counsel and attornies for the same, without any reward taking therefore; and after the said writ or writs be returned, if it be before the king in his bench, the justices there shall assign to the same poor person or persons counsel learned, by their discretions, which shall give their counsel, nothing taking for the same; and likewise the justices shall appoint attorney and attornies for the same poor person or persons, and all other officers requisite and necessary to be had for the speed of the said suits to be had and made, which shall do their duties without any reward for their counsels, help, and business in the same; and the same law and order shall be observed and kept of all such suits to be made afore the

king's justice of his common place and barons of his exchequer, and all other justices in the Court of record where any such suit shall be."

The statute only applied to the Courts of Common Law, but the practice of those Courts was followed by the Court of Chancery, and was there extended to the case of pauper defendants, who were outside the provisions of the statute (*Oldfield* v. *Cobbett*, 1845, 1 Ph. Ch. 613).

Practice under the Judicature Acts.—The statute was repealed by the Statute Law Revision and Civil Procedure Act, 1883 (46 & 47 Vict. c. 49); and the present practice is regulated by Order 16, rr. 22–31 of the Rules of the Supreme Court, 1883, those rules being adapted from Orders 7 and 12 of the Chancery Consolidated Orders. The provisions of those rules are, shortly, as follows:—

Any person may be admitted to sue or defend as a pauper on proof that he is not worth £25 (the former limit was £5), exclusive of his wearing apparel and the subject-matter of the action (Order 16, r. 22).

A person desirous of suing as a pauper must lay a case before counsel for his opinion whether or not he has reasonable ground for proceeding (r. 23).

The case for the opinion of counsel and his opinion thereon, with an affidavit of the party or his solicitor that the case contains a full and true statement of all the material facts, must be produced before the Court, or judge, or proper officer to whom the application is made, no fee being payable by the pauper to his counsel or solicitor (r. 24).

A person admitted to sue or defend as a pauper is not liable to any Court fee (r. 25).

A counsel or solicitor, or both, may be assigned to a person admitted to sue or defend as a pauper, and such counsel or solicitor is not at liberty to refuse his assistance unless he satisfies the Court or judge that he has some good reason for refusing (r. 26).

Whilst a person sues or defends as a pauper, no person shall take, or agree to take, or seek to obtain from him any fee, profit, or reward, for the conduct of his business in the Court, otherwise he will be guilty of a contempt of Court (r. 27).

A person admitted to sue or defend as a pauper who gives, or agrees to give, any fee, profit, or reward, will be forthwith dispaupered, and not again admitted in the same cause to sue or defend as a pauper (r. 28).

No notice of motion may be served or summons issued, and no petition presented, on behalf of any person admitted to sue or defend as a pauper, except for the discharge of his solicitor, unless it is signed by his solicitor (r. 29).

It is the duty of the solicitor assigned to a person admitted to sue or defend as a pauper to take care that no notice is served, or summons issued, or petition presented, without good cause (r. 30).

Costs ordered to be paid to a person admitted to sue or defend as a pauper will, unless otherwise ordered, be taxed as in other cases (r. 31).

Who may apply.—A plaintiff or defendant suing or defending in a representative capacity will not be admitted to sue or defend as a pauper (*Paradice* v. *Sheppard*, 1745, 1 Dick. 136; *Oldfield* v. *Cobbett*, 1840, 2 Beav. 444; *St. Victor* v. *Devereux*, 1843, 6 Beav. 584), unless he is also beneficially interested (*Rogers* v. *Hooper*, 1853, 1 W. R. 474; *Parkinson* v. *Chambers*, 1854, 3 W. R. 34; *Everson* v. *Matthews*, 1855, 3 W. R. 159; *Martin* v. *Whitmore*, 1869, 17 W. R. 809). But a defendant who defends as an executor, and is in contempt, may be admitted to defend *in formâ pauperis*, for the single purpose of clearing his contempt (*Oldfield* v. *Cobbett*, 1844, 1 Coll. 169).

An infant by his next friend can obtain an order (*Bryant* v. *Wagner*, 1844, 7 Dowl. P. C. 676; *Lindsay* v. *Tyrrell*, 1857, 2 De G. & J. 7).

A party to proceedings on the Crown side of the Queen's Bench Division cannot be admitted to proceed as a pauper (*Mulleneisen* v. *Coulson*, 1888, 21 Q. B. D. 3); but this rule of practice only applies to cases between the Crown and a subject; and therefore, though a County Court appeal is entered in the Crown paper, leave may be given to an appellant to prosecute such an appeal as a pauper (*Clements* v. *London and North-Western Rwy. Co.*, [1894] 2 Q. B. 482).

When order obtainable.—The order may be obtained at any time after the commencement of the action (*Brunt* v. *Wardle*, 1841, 3 Man. & G. 534; *Pitcher* v. *Roberts*, 1842, 12 L. J. Q. B. 178; *Doe d. Ellis* v. *Owens*, 1842, 12 L. J. Ex. 53; *Holmes* v. *Penny*, 1854, 23 L. J. Ex. 132; *Parkinson* v. *Chambers*, 1854, 3 W. R. 34). But it is not retrospective (*Doe d. Ellis* v. *Owens*, 1842, 12 L. J. Ex. 53; *Smith* v. *Pawson*, 1848, 2 De G. & Sm. 490). The granting the order is a matter of discretion (per Lord Herschell, *M'Cabe* v. *Bank of Ireland*, 1889, 14 App. Cas. 41).

Affidavit.—The affidavit of means must be made by the applicant himself (*Wilkinson* v. *Belsher*, 1757, 2 Bro. C. C. 272). The meaning of the common affidavit is, that the party has not £25 in the world, besides, etc., available for the prosecution or defence of the action; if he can make the affidavit with truth in that sense, the omission to set forth the details of his means, and the circumstances which render them unavailable, is not such an omission of material facts as will induce the Court on that ground alone to discharge the order (*Dresser* v. *Morton*, 1847, 2 Ph. Ch. 286). It is not enough that he should swear that he has only £25 "after payment of his just debts" (*Perry* v. *Walker*, 1844, 1 Coll. 229). Where the affidavit stated that the defendant, a farming tenant, had valuable crops on his farm, but no other property, leave to defend as a pauper was refused, although he had in the suit been restrained from selling or removing the crops (*Ridgway* v. *Edwards*, 1874, L. R. 9 Ch. 143).

If on the face of the affidavit the Court can see that the applicant has no case, the order will be refused (*In re Cobbett*, 1858, 27 L. J. Ex. 199).

Opinion of Counsel.—The rule requiring an opinion of counsel to be obtained and submitted to the Court only applies to the case of a party desiring to *sue* as a pauper, and is not necessary in the case of a party desirous of obtaining an order to *defend* (*Bird* v. *Bird*, 1868, 17 W. R. 155).

The defendant is not entitled to inspect the case laid before counsel under Order 16, r. 23, and his opinion thereon, even when made exhibits to the affidavit filed under r. 24, for they are merely for the information of the judge (*Sloane* v. *British Steamship Co.*, [1897] 1 Q. B. 185).

Order, how obtained.—The order is obtained in the Chancery Division on petition of course, addressed to the High Court of Justice (Daniell's *Ch. Pr.* p. 86; Daniell's *Forms*, p. 33); in the Queen's Bench Division on petition addressed to the Lord Chief Justice (Chitty's *Arch.* p. 1183), though it seems that in the latter Division the order is now frequently made by a master without petition, on production of the affidavit and opinion of counsel (*Annual Practice*, 1898, p. 383). In the case of *In re Lewin*, 1884, 33 W. R. 128, Kay, J., made an order for leave to present a petition *in formâ pauperis*, and assigned counsel to the applicant on motion, but expressed the opinion that the application might be made by summons. Notwithstanding this decision the regular and usual course in the Chancery Division is to proceed by petition of course.

From what time the Order takes effect.—The order as a rule takes effect

from the time of its being served on the opposite party. Thus a party admitted to sue *in formâ pauperis* was ordered to pay *dives* costs to a defendant of a step taken before service (*Ballard* v. *Catling*, 1838, 2 Keen, 606; and see *Fray* v. *Voules*, 1867, L. R. 3 Q. B. 214). But in *Church* v. *Marsh*, 1843, 2 Hare, 652, it was held that the order is not inoperative until service, where there is no *mala fides* in withholding it, and no step has been taken inconsistent with it.

Assignment of Counsel or Solicitor.—After counsel has been assigned the pauper cannot as a rule be heard in person (*Parkinson* v. *Hanbury*, 1853, 4 De G., M. & G. 508). But if no counsel has been assigned, the pauper can plead in person (*Tucker* v. *Collinson*, 1886, 16 Q. B. D. 562), and the rule which provides that no notice of motion shall be served on behalf of a pauper unless it is signed by a solicitor (Order 16, r. 29), does not apply to a pauper who elects to sue in person, and to whom, therefore, no solicitor has been assigned (*Jacobs* v. *Crusha*, [1894] 2 Q. B. 37).

A plaintiff cannot obtain an order to assign counsel to a pauper defendant (*Garrod* v. *Holden*, 1841, 4 Beav. 245).

Appeals by Pauper.—A pauper may appeal (*Bland* v. *Lamb*, 1820, 2 Jac. & W. 402; *Crouch* v. *Waller*, 1859, 4 De G. & J. 43). A party who has obtained leave to sue or defend as a pauper in the Court below may appeal as a pauper without leave (*Drennan* v. *Andrew*, 1866, 1 Ch. 300, and see footnote, p. 301; *Biggs* v. *Dagnall*, [1895] 1 Q. B. 207). Where, however, he has not sued or defended as a pauper below, an application for leave to appeal *in formâ pauperis* must be made *ex parte* to the Court of Appeal, the procedure under Order 16, rr. 22–24 being followed (*In re Goldberg*, [1893] 1 Q. B. 417; and see *In re Roberts*, *Kiff* v. *Roberts*, 1886, 33 Ch. D. 265).

Appeal to House of Lords.—By the Appeal (Formâ Pauperis) Act, 1893 (56 & 57 Vict. c. 22), s. 1, it is provided that, where in an appeal to the House of Lords a petition is presented for leave to sue *in formâ pauperis*, and the House on the report of the Appeal Committee determines that there is no *primâ facie* case for the appeal, the House may refuse the prayer of the petition (see *Blair* v. *North British and Mercantile Insurance Co.*, 1890, 15 App. Cas. 495).

Leave to appeal *in formâ pauperis* was refused where it appeared that the petitioner was appealing as one of the public to enforce an alleged public right, and that subscriptions had been collected to assist the petitioner in the litigation (*Bowie* v. *Ailsa* (*Marquis*), 1889, 13 App. Cas. 371).

Costs.—The present rule (Order 16, r. 31) providing that costs ordered to be paid to a party admitted to sue or defend as a pauper shall be taxed as in other cases, has effected a considerable change in practice, especially in the Chancery Division. The rule was judicially construed in *Curson* v. *Pickersgill*, 1885, 14 Q. B. D. 859, in which it was held that a successful plaintiff in an action *in formâ pauperis* tried before a judge and jury is entitled upon taxation as against the defendant to costs out of pocket only, and cannot be allowed anything for remuneration to his solicitor or fees to counsel. The judgments of Brett, M. R., and Bowen, L.J., should be consulted. They enter into the history of the practice as to costs in pauper cases prior to the Judicature Acts, in the Courts of law and equity respectively. At law a practice grew up under which so soon as a pauper recovered a verdict, he was dispaupered, with the effect that he was enabled to pay counsel and attorneys, and recover the amount from the opposite side. This practice was denounced as contrary to law, and to r. 121

of the Reg. Gen. of Hilary Term, 1853, by the judges in *Dooly* v. *Great Northern Rwy. Co.*, 1854, 4 El. & Bl. 341; and from that time the practice at law was settled. In the Court of Chancery the practice has varied at different periods. Thus in *Angell* v. *Smith*, 1703, Prec. Ch. 219, it was held that a plaintiff suing *in formâ pauperis*, and having a decree in his favour with costs, was only entitled to recover costs out of pocket. In several cases, however, "dives costs," that is costs on the same scale as paid to other suitors, were allowed. Thus in *Scatchmer* v. *Foulkard*, 1701, 1 Eq. Ca. Abr. 125, Lord Somers allowed "dives costs" to a pauper, "for though he was at no costs, yet the counsel and clerks do not give their labour to the defendant but to the pauper" (see also *Wallop* v. *Warburton*, 1795, 2 Cox C. C. 409; *Rattray* v. *George*, 1809, 16 Ves. 232; *Rubery* v. *Morris*, 1849, 1 Mac. & G. 413). Finally, in 1849 by Consolidated Order 40, r. 5, it was provided that where costs were ordered to be paid to a party suing or defending *in formâ pauperis*, such costs should be taxed as *dives* costs, unless the Court should otherwise direct. The result, therefore, was that "down to the Judicature Acts, the costs of the pauper were at common law not in the discretion of the Court, while the Chancery Court had power over them" (per Bowen, L.J., *Carson* v. *Pickersgill*, p. 871). The effect of r. 31 as interpreted in *Carson* v. *Pickersgill* is in accordance with the practice at law, and a successful pauper who is awarded costs can only recover from his opponent costs which he has paid or is liable to pay. This rule now prevails in all the Divisions of the High Court, and in the House of Lords (per Lindley, L.J., *Richardson* v. *Richardson*, [1895] Prob. 346).

Costs in House of Lords.—On the taxation of a pauper appellant's costs on a successful appeal to the House of Lords, the fees of the House and the fees of counsel are to be disallowed, and the solicitor is to have his costs out of pocket, with a reasonable allowance to cover office expenses, including clerks, etc. (*Johnson* v. *Lindsay*, [1892] App. Cas. 110).

Costs incurred before Order.—The order to sue or defend as a pauper has not the effect of releasing the pauper from liability for costs ordered to be paid by him prior to the order (*Fray* v. *Voules*, 1867, L. R. 3 Q. B. 214; and see *Prince Albert* v. *Strange*, 1849, 13 Jur. 507; *Smith* v. *Pawson*, 1848, 2 De G. & Sm. 490).

Costs ordered to be paid by Pauper.—Though as a rule a pauper will not be ordered to pay costs, he may under certain circumstances be ordered to do so. Thus a pauper was not allowed to amend by striking out defendants without paying their costs (*Wilkinson* v. *Belsher*, 1787, 2 Bro. C. C. 272; and see *Parkinson* v. *Hanbury*, 1853, 4 De G., M. & G. 508).

A pauper plaintiff, who is in default and asks for indulgence, may be required as a condition of such indulgence being granted to pay costs incurred by the other party by reason of such default (*Jacobs* v. *Crusha*, [1894] 2 Q. B. 37; and see *Foster* v. *Bank of England*, 1845, 2 D. & L. 790).

The Statute 23 Hen. VIII. c. 15, s. 2, provided that a pauper plaintiff failing in his suit should not pay costs, but should suffer other punishment at the discretion of the judge. In old days the practice was to tax the costs, and for non-payment to order the plaintiff to be whipped, though the punishment does not ever appear to have been inflicted (Bac. *Abr.* tit. "Pauper" (D); Tidd's *Practice*, p. 98).

Court Fees.—A party suing *in formâ pauperis* was held entitled to a chief clerk's certificate without paying Court fees, even though the order enabling him so to sue was made after the certificate was ready (*Thomas* v. *Ellis*, 1878, 8 Ch. D. 518).

Staying Proceedings.—The Court of Exchequer stayed proceedings in a

pauper suit until the costs of a former suit in Chancery were paid (*Calvert* v. *Rooth*, 1841, 4 Y. & C. C. 514).

Dispaupering.—A person suing or defending *in formâ pauperis* will be dispaupered if he is at any time during progress of the suit shown to possess property beyond the prescribed limit (*Perry* v. *Walker*, 1844, 1 Coll. 229; *Rexworthy* v. *Rexworthy*, 1838, 7 L. J. Ch. 136; *Boddington* v. *Woodley*, 1842, 5 Beav. 555; *Taprell* v. *Taylor*, 1846, 9 Beav. 493; *Goldsmith* v. *Goldsmith*, 1846, 5 Ha. 125; *Butler* v. *Gardener*, 1850, 12 Beav. 525; *Burry Port Co.* v. *Bowser*, 1857, 26 L. J. Ch. 319). The fact of a subscription being made to help the plaintiff was held insufficient to dispauper him (*Corbett* v. *Corbett*, 1810, 16 Ves. 409).

A pauper may also be dispaupered where he is shown to have been guilty of vexatious conduct in the action (*Wagner* v. *Mears*, 1829, 3 Sim. 127; *Perry* v. *Walker*, 1844, 1 Coll. 229). But vexatious conduct in a former suit is not sufficient ground for an order to dispauper (*Corbett* v. *Corbett*, 1810, 16 Ves. 409). A person will also be dispaupered who gives or agrees to give any fees to his counsel or solicitor (Order 16, r. 29).

Discharge of Order.—An order to sue as a pauper may be set aside for irregularity (*Nowell* v. *Whitaker*, 1843, 6 Beav. 407); but an application to discharge for irregularity must be promptly made (*Parkinson* v. *Hanbury*, 1853, 4 De G., M. & G. 508).

Poor Prisoners confined for Contempt.—By 23 & 24 Vict. c. 149, s. 2, it is the duty of the official solicitor or other officer appointed by the Lord Chancellor to visit Holloway Prison quarterly, and examine the prisoners confined there for contempt, and report to the Lord Chancellor, who may assign a solicitor to defend the prisoner *in formâ pauperis*.

By the seventh rule of the 11 Geo. IV. and 1 Will. IV. c. 36, the Court of Chancery was authorised to order that the costs of the contempt of any such prisoner should be paid out of the Suitors' Fee Fund, which by 32 & 33 Vict. c. 91 was transferred to the National Debt Commissioners. On motion on behalf of a pauper defendant in contempt that he may be discharged from custody, there is no power to order the costs of the plaintiff upon his own application to be provided for by the Treasury (*Hall* v. *Hall*, 1871, L. R. 11 Eq. 290).

[*Authorities.*—*Annual Practice*, 1898, pp. 380–385; Bacon's *Abridgment of the Law*, 7th ed., tit. "Pauper"; Chitty's *Archbold's Practice*, 14th ed., pp. 1182–1184; Chitty's *Forms*, 12th ed., pp. 577–579; Daniell's *Chancery Practice*, 6th ed., pp. 84–92, 165, 166; Daniell's *Forms*, 4th ed., pp. 33–36; Morgan and Wurtzburg on *Costs*, 1882, pp. 371–377; Morgan's *Chancery Acts and Orders*, 6th ed., p. 341; Seton's *Judgments and Orders*, 5th ed., pp. 908–910; Sidney Smith's *Practice of the Court of Chancery*, 7th ed., pp. 869–874; Tidd's *Practice*, 9th ed., pp. 97–99.]

Informations.

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MEANING AND NATURE OF INFORMATIONS.—An Information is an accusation or complaint exhibited against a person for some criminal offence, either immediately against the king, or against a private person, which, from its enormity or dangerous tendency, the public good requires to be restrained and punished (Bacon, *Abr.* tit. "Informations"). An Information has also been defined as a suggestion upon record by which, in certain cases, the matter of a suit is allowed to be brought before the High Court of Justice (see Shortt on *Informations*, ch. i. p. 1). It derives its name from the words by which it gives the Court to understand and be informed of the facts which it alleges. The offence in respect of which an Information can be filed must be merely a misdemeanour. Treason and felonies cannot be prosecuted on Information (see 2 Hale, *Pleas of Cr.* 148, 151; Comyns, *Dig.* tit. "Information").

The distinction between an Information and an Indictment is that an Indictment is an accusation found by the oath of twelve men (see INDICTMENT), whereas an Information is only the allegation of the officer who exhibits it (see 2 Hawk. *Pleas of Cr.* c. 26, s. 4). Hence it has been argued that procedure by Information is illegal, as being opposed to the provisions of Magna Carta, and other enactments, which require that no man be brought to answer except upon presentment or indictment of twelve sworn men (see *Prynn's* case, 1690, 5 Mod. 459).

But it is clear that Informations were recognised at common law as a legal mode of prosecution of certain offences inferior to capital offences, *i.e.* inferior to treason and felonies (see per Holt, C.J., *Prynn's* case, 1690, 5 Mod. 463; S. C. *sub nom. R.* v. *Berchet*, 1690, 1 Show. 106; per Coleridge, C.J., *R.* v. *Labouchere*, 1884, 12 Q. B. D. at p. 325; see also 2 Hale, *Pleas of Cr.* ch. xx.; 4 Black. *Com.* ch. xxiii. s. iii.). In other words, an Information would lie at common law in respect of any misdemeanour. In fact the mode of prosecution by Information or suggestion filed on record by the King's Attorney-General or by his Coroner or Master of the Crown Office in the Court of King's Bench is as ancient as the common law itself (see 4 Black. *Com.* ch. xxiii. s. iii.).

As to the history of Criminal Informations, see generally Sir James Stephen, *History of the Criminal Law of England*, vol. i. pp. 294 *et seq.*; see also Bacon's *Abridgment*, title "Informations."

VARIOUS KINDS OF INFORMATIONS.—There are two broad classes of Informations: (1) Informations which are partly at the suit of the Crown, and partly at that of a subject. These are usually brought upon penal statutes which inflict a penalty upon conviction of the offender, one part to the use of the Crown and another to the use of the informer.

Such Informations are a species of *qui tam* actions, only carried on by a criminal instead of a civil process. (As to these, see QUI TAM.) (2) Informations which are in the name of the Crown only. These criminal Informations are subdivided into (*a*) those which are filed *ex officio* by the Attorney-General, and (*b*) those in which, though the Crown is the nominal prosecutor, yet the Information is at the relation of some private person or common informer; such Informations are filed in the Queen's Bench Division by the Queen's Coroner and Attorney, usually called the Master of the Crown Office, who for this purpose is the standing officer of the public (see 4 Black. *Com.* ch. xxiii. s. iii.).

Formerly certain suits might be instituted in Chancery by Information of the Attorney- or Solicitor-General. This class of Informations was, however, abolished by Order 1, r. 1 of the R. S. C. 1883, which provided that all suits which were formerly commenced by Information in the High Court of Chancery are henceforth to be instituted by action in the ordinary way.

Informations were also filed by the Attorney-General in the Court of Exchequer in Revenue cases; these are termed English Informations, they are unaffected by the Judicature Acts, and may still be resorted to. As to English Informations, see the Crown Suits, etc., Act, 1865, 28 & 29 Vict. c. 102; Fowler's *Exchequer Practice*, 2nd ed., 1817, vol. i. pp. 103–105; *A.-G.* v. *Williamson*, 1889, 60 L. T. 930; see also the articles EXCISE; INLAND REVENUE.

As to Informations in the nature of *Quo Warranto*, which are civil proceedings, see the article QUO WARRANTO.

EX OFFICIO INFORMATIONS.—*Who may file.*—The Attorney-General may in his discretion, and without leave, file an Information for any misdemeanour. In case of a vacancy in the office of Attorney-General the Solicitor-General has the same power (see, for example, *R.* v. *Wilkes*, 1770, 4 Burr. 2553).

It has been held that it is not competent to the Attorney-General of the Duchy of Lancaster to exhibit an Information in the High Court, and the Court will order an Information exhibited by him to be taken off the file on the application of the defendant, even after answer put in by the defendant (*The Attorney-General of the Duchy of Lancaster* v. *The Duke of Devonshire*, 1884, 14 Q. B. D. 195).

Cases in which filed.—Though an Information may be filed in respect of any misdemeanour, it is the more appropriate mode of prosecuting such misdemeanours as peculiarly tend to disturb or endanger the government, or to affront the sovereign in the discharge of the royal functions, delay being thereby avoided in the prosecution of such offences (see 4 Black. *Com.* ch. xxiii. s. iii.).

The Court will never on motion grant leave for the Attorney-General to file an Information, because he has power himself to do so without leave (see *R.* v. *Phillips*, 1767, 4 Burr. 2090).

Libel.—An important class of cases in which Informations have been filed by the Attorney-General *ex officio* is that of libel. In libels of a public character or reflecting on persons in a public position, the appropriate procedure is by Information. Thus Informations have frequently been filed for seditious libels such as libellous publications personally attacking the sovereign (see *R.* v. *Clerk*, 1728, 1 Barn. 304; *R.* v. *Knell*, 1729, *ibid.* 305; 11 R. R. 748; *R.* v. *Wilkes*, 1770, 4 Burr. 2527; *R.* v. *Lambert and Perry*, 1810, 2 Camp. 398; *R.* v. *Harvey and Chapman*, 1823, 2 Barn. & Cress.

257), or libellous publications attacking the administration or the constitution generally, and tending to create disaffection (see *R.* v. *Tutchin*, 1704, 14 St. Tri. 1095; *R.* v. *Brown*, 1707, 11 Mod. 86; *R.* v. *Francklin*, 1731, 17 St. Tri. 626; *R.* v. *Rainer*, 1733, 2 Barn. 293; *R.* v. *Owen*, 1752, 18 St. Tri. 1203; *R.* v. *Horne*, 1777, 20 St. Tri. 651; *R.* v. *Gordon*, 1787, 22 St. Tri. 175; *R.* v. *Stockdale*, 1789, 22 St. Tri. 237; *R.* v. *Reeves*, 1796, 26 St. Tri. 530; *R.* v. *Cobbett*, 1804, 29 St. Tri. 1; *R.* v. *Hunt*, 1811, 31 St. Tri. 367; *R.* v. *Sutton*, 1816, 4 M. & S. 532; *R.* v. *Burdett*, 1820, 3 Barn. & Ald. 717).

Libels on foreign sovereigns and ambassadors have also been prosecuted by *ex officio* Information, on the ground that they tend to involve this country in disputes and warfare (see *R.* v. *D'Eon*, 1764, Black. W. 510; *R.* v. *Gordon*, 1787, 22 St. Tri. 175; *R.* v. *Vint*, 1799, 27 St. Tri. 627; *R.* v. *Peltier*, 1803, 28 St. Tri. 617).

The provision of the Newspaper Libel and Registration Act, 1881, 44 & 45 Vict. c. 60, s. 3, that no criminal prosecution for a newspaper libel was to be commenced without the written fiat of the Director of Public Prosecutions, did not apply to an *ex officio* Information by the Attorney-General (see *R.* v. *Yates*, 1885, 14 Q. B. D. 648), nor apparently does sec. 8 of the Law of Libel Amendment Act, 1888, which repeals the former provision and requires the order of a judge at chambers to be first obtained in such case (see Short and Mellor, *Cr. Of. Pr.* p. 262).

Informations have also been filed in cases of blasphemous and obscene libels (see *R.* v. *Waddington*, 1822, 1 Barn. & Cress. 26; 25 R. R. 288; *R.* v. *Curl*, 1727, 2 Stra. 788; *R.* v. *Wilkes*, 1770, 4 Burr. 2527; *R.* v. *Eaton*, 1812, 31 St. Tri. 927; *R.* v. *Carlile*, 1819, 3 Barn. & Ald. 161; 22 R. R. 333).

Election Offences.—Corrupt practices at parliamentary elections have also been prosecuted on *ex officio* Information, *e.g.* bribery (*R.* v. *Leatham*, 1861, 3 El. & El. 658; *R.* v. *Boyes*, 1861, 1 B. & S. 311; *R.* v. *Charlesworth*, 1861, *ibid.* 460), intimidation (*R.* v. *Conway*, 1858, 7 Ir. R. C. L. 507), and undue influence (*R.* v. *Duggan*, 1873, 7 Ir. R. C. L. 94). But the prosecution of these offences is now provided for by the Corrupt and Illegal Practices Prevention Act, 1883 (see CORRUPT PRACTICES).

Miscellaneous Cases.—Numerous other offences have been made the subject of an *ex officio* Information by the Attorney-General, such, for example, as offences against the Revenue; bribery of a Custom House officer (see 3 Chitty, *Cr. Law*, 689, 693; see also BRIBERY); extortion (*R.* v. *Douglas*, 1846, 13 Q. B. 42); spreading false rumours (2 Chitty, *Cr. Law*, 527); riot and conspiracy (see 3 Chitty, *Cr. Law*, 1150); defrauding the revenue (see 4 Went. *Prec.* 442 *et seq.*); neglect of duty as Vice-Chancellor of University (*R.* v. *Purnell*, 1748, 1 Wils. 239); misdemeanour in exercise of office of justice of the peace (*R.* v. *Phillips*, 1767, 4 Burr. 2090); and many other cases of misdemeanour.

Modern Practice as to filing Ex Officio Information.—In modern practice, however, Informations are rarely filed *ex officio* by the Attorney-General except by direction of one of the Houses of Parliament, or of some public department (see Cole on *Informations*, p. 9; Shortt on *Informations*, p. 5, note; Short and Mellor, *Cr. Of. Pr.* 276), or in respect of misdemeanours committed by public officers in the execution of their office abroad (see the Criminal Jurisdiction Act, 1802, 42 Geo. III. c. 85, s. 1), or in other cases of a very serious nature. Sir James Stephen, in summing up the modern practice with regard to the filing of a criminal Information *ex officio*, states (*Digest of Criminal Procedure*, 1883, p. 126, art. 198) that Informations are usually filed in cases of misdemeanours having a tendency to disturb the public peace or to interfere with good government, as, for instance, cases of

seditious libel, or other libels in which the public are interested, cases of official corruption, fraud, or misconduct, and cases of bribery.

Procedure on Ex Officio Information.—Before exhibiting an Information *ex officio* the Attorney-General in his discretion may call on the defendant to show cause why the Information should not be exhibited (see per Lord Mansfield, C.J., *R.* v. *Phillips*, 1767, 4 Burr. 2090).

The Information having been drawn (usually by a junior counsel), settled by the Attorney-General, engrossed on parchment and signed by the Attorney-General, is filed at the Crown Office without any rule of Court or recognisance (see further as to the practice, Short and Mellor, *Cr. Of. Pr.* p. 278). It is now a common practice when an Information is filed *ex officio* for the Master of the Crown Office to give notice thereof to the person against whom it is filed (see Stephen, *Digest of Criminal Procedure*, 1883, p. 126, note). The Information may be amended by the Attorney-General as a matter of right at any time even after demurrer or plea (see *R.* v. *Holland*, 1791, 4 T. R. 457; 2 R. R. 439; *R.* v. *Wilkes*, 1770, 4 Burr. 2528; Shortt on *Informations*, p. 11).

The Court has power to quash an *ex officio* Information (see *Fountain's* case, 1663, 1 Sid. 152), but this power is rarely, if ever, exercised, the Attorney-General, as above stated, having power to amend, or if necessary to enter a *nolle prosequi*, and prefer a new charge (see Shortt on *Informations*, p. 11).

The practice with regard to the trial of an *ex officio* Information is with slight exception the same as that of criminal Informations not *ex officio* (see *post* under the head *Procedure on Information*).

Criminal Informations not Ex Officio.—*Filed only by leave.*—Criminal Informations, with the exception of those filed *ex officio*, can only be filed by leave of the Court upon application.

The Statute 4 & 5 Will. & Mary, c. 18, after reciting that Informations had of late been maliciously exhibited and prosecuted in the Court of King's Bench against persons in all counties of England for trespasses, batteries, and other misdemeanours, and that after the parties informed against had appeared to such Informations, and pleaded to the issue, the informers frequently abandoned the proceedings, enacted that Informations for any of the above-mentioned causes should not be exhibited or filed by the Clerk of the Crown in the Court of King's Bench without express order given by the Court, and prohibited the Clerk of the Crown from issuing any process upon any Information until the parties exhibiting the Information had been bound by recognisances to effectually prosecute the same. The Act does not extend to Informations exhibited *ex officio* (see *ibid.* s. 6). The grounds upon which an Information may be granted are not enumerated, but are left to the discretion of the Court (see *R.* v. *Jolliffe*, 1791, 4 T. R. at p. 290; 2 R. R. 383).

In accordance with this statute it is now provided by the Crown Office Rules, 1886, r. 46, that, with the exception of *ex officio* Informations, no Criminal Information is to be exhibited, received, or filed at the Crown Office without express order of the Queen's Bench Division in open Court, nor is any process to be issued upon any Information, other than an *ex officio* Information, until the person procuring such Information to be exhibited has filed at the Crown Office a recognisance in the penalty of £50 effectually to prosecute such Information, and to abide by and observe such orders as the Court shall direct. Such recognisance is to be entered into before the Queen's Coroner and Attorney, or the Master of the Crown

Office, or a justice of the peace of the county, borough, or place in which the cause may have arisen (*ibid.*; for form of recognisance to prosecute a Criminal Information, see C. O. R. 1886, Form No. 27).

Cases in which filed.—The objects of Informations filed by the Master of the Crown Office upon the complaint or relation of a private subject are enumerated by Blackstone as "any gross and notorious misdemeanours, riots, batteries, libels, and other immoralities of an atrocious kind, not peculiarly tending to disturb the Government, for those are left to the care of the Attorney-General, but which on account of their magnitude or pernicious example deserve the most public animadversion" (see 4 *Com.* ch. xxiii. s. iii.).

The granting of leave to file an Information is entirely in the discretion of the Court (see per Lord Kenyon, C.J., *R.* v. *Jolliffe*, 1791, 4 T. R. at p. 290; 2 R. R. 383). But the extraordinary intervention by means of a Criminal Information is a procedure of a high prerogative character reserved for cases of public importance (see per Cockburn, C.J., *R.* v. *Lord Winchelsea*, 1865, cited in 12 Q. B. D. at p. 327). And in modern practice the grounds upon which the Court will grant a Criminal Information at the instance of a private individual are considerably more restricted than formerly (see per Lord Coleridge, C.J., *R.* v. *Labouchere*, 1884, 12 Q. B. D. at p. 326). And at the present time leave to file a Criminal Information will be granted only in cases of misdemeanours of a serious and public character, such, for example, as libellous attacks upon and offences by persons in some public or official position (see Shortt on *Informations*, p. 13; Short and Mellor, *Cr. Of. Pr.* p. 257).

Libel.—The granting of a Criminal Information in cases of libel has been said to be usually and properly confined to cases of magistrates, ministers, public officers, and persons in a high position, whose character was of such public importance as to require immediate vindication (see per Lord Blackburn, *R.* v. *Lord Winchelsea*, 1865, *ante*). Thus Informations have been granted in respect of a libel on a member of the House of Lords imputing treason and reflecting on his speeches in the House (*R.* v. *Haswell and Bate*, 1780, 1 Doug. K. B. 387); a libel reflecting on the official conduct of a town-clerk (*R.* v. *Waite*, 1743, 1 Wils. 22), and in cases of libels on magistrates. And though formerly Informations were frequently granted for serious libels on private individuals, the rule to be collected from the modern decisions is that a Criminal Information for libel can only be granted at the suit of persons who are in some public office or position, and leave to file an Information for libel will not be granted at the suit of a private person (see *R.* v. *Labouchere*, 1884, 12 Q. B. D. 320, where the cases on the subject are collected and reviewed). In that case an application for leave to file a Criminal Information in respect of a libel upon a deceased foreign nobleman made by his representative was refused; the fact that the applicant was not resident in this country appears strongly to have influenced the discretion of the Court (see *ibid.* 322). An application for a Criminal Information in cases of alleged libel will not be sanctioned by the Court if resorted to for the purpose of extorting an apology (*R.* v. "*The World*," 1876, Cox C. C. 305), and in such cases the counsel who applies for an Information must give an undertaking on the part of the prosecutor that it shall be tried and carried to its legitimate conclusion (*ibid.* p. 308).

Informations have been granted for libels reflecting on a society or body of persons, such as the clergy of a diocese (*R.* v. *Williams*, 1822, 5 Barn. & Ald. 595), the East India Company (*R.* v. *Jenour*, 1740, 7 Mod. 401), a community of Portuguese Jews settled in England (*R.* v. *Osborn*, 1732, 5 Barn. 138),

the justices of peace for a county (*R.* v. *Alderton*, 1755, cited in 5 Barn. & Ald. 596; *R.* v. *Holloway*, 1775, *ibid.*).

It has been held that sec. 3 of the Newspaper Libel and Registration Act, 1881, 44 & 45 Vict. c. 60, which required the written fiat of the Director of Public Prosecutions to be obtained before the commencement of any criminal prosecution against any proprietor, publisher, or editor, or any person responsible for the publication of a newspaper, for any libel published therein, did not apply to a Criminal Information for libel filed by order of the Court (*Yates* v. *The Queen*, 1885, 14 Q. B. D. 648). That section was repealed by the Law of Libel Amendment Act, 1888, 51 & 52 Vict c. 64, sec. 8 of which Act requires the order of a judge at chambers to be obtained before the commencement of any such criminal prosecution. It would seem that it is not necessary to obtain such an order before commencing a prosecution by way of Criminal Information (see Short and Mellor, *Cr. Of. Pr.* p. 262).

Offences by Magistrates and Public Officers.—An Information will be granted against a magistrate in respect of any illegal act done corruptly or oppressively, but unless it be shown that he acted from a dishonest, oppressive, or corrupt motive, leave will not be granted for a Criminal Information (see *R.* v. *Borron*, 1820, 3 Barn. & Ald. 432; 22 R. R. 447; and C. O. R. 1886, r. 48; see also *R.* v. *Williams*, 1762, 3 Burr. 1317; *Ex parte Fentiman*, 1834, 2 Ad. & E. 127; *R.* v. *Jackson*, 1787, 1 T. R. 653; 1 R. R. 343; *R.* v. *Barker*, 1800, 1 East, 186; *R.* v. *Williamson*, 1820, 3 Barn. & Ald. 582). When there is gross misbehaviour on the part of justices which could not be attributed to mistake or ignorance of law, an Information may be obtained (see *R.* v. *Brooke*, 1788, 2 T. R. 190), *e.g.* for extortion (*R.* v. *Jones*, 1742, 1 Wils. 7), improper conviction of an innocent person by a magistrate (*R.* v. *Webster*, 1789, 3 T. R. 388; *R.* v. *Saunders*, 1847, 10 Q. B. 484), or a decision by a justice in a case in which he is directly interested (*R.* v. *Davis*, 1772, Lofft, 62; *R.* v. *Whately*, 1829, 4 M. & R. 431), for improperly refusing or granting licences (*R.* v. *Williams*, 1762, 3 Burr. 1317; *R.* v. *Hann and Price*, 1765, *ibid.* 1716; *R.* v. *Holland and Foster*, 1787, 1 T. R. 692), for appointing overseers from a corrupt and improper motive (*R.* v. *JJ. of Somersetshire*, 1822, 1 D. & R. 443), for corruptly and wilfully making a false return to a mandamus (*R.* v. *Spotland*, 1735, Lee *t.* Hard. 184; *R.* v. *Pettiward*, 1769, 4 Burr. 2452; *R.* v. *JJ. of Lancashire*, 1822, 1 D. & R. 485), or for neglect of duty in not using force to repress a riot (*R.* v. *Heming*, 1833, 5 Barn & Adol. 666).

So also an Information will lie against persons holding public office or in some public position in respect of wilful misconduct or breach of duty in such office or position (see *R.* v. *Herbert*, 1759, 2 Ken. (Ld.) 466; *R.* v. *Watson*, 1743, 1 Wils. 41; *R.* v. *Tarrant*, 1767, 4 Burr. 2106; *R.* v. *Robe*, 1835, 2 Stra. 999; see, however, *R.* v. *Compton*, 1783, Cald. 246, and *R.* v. *Jennings*, 1845, 2 D. & L. 741). An Information was granted against Highway Commissioners for acts exceeding their powers (*R.* v. *Rogers*, 1758, 2 Ken. (Ld.) 373), and against the inhabitants of a parish for non-repair of a road where an indictment had been thrown out by the Grand Jury (*R.* v. *The Inhabitants of Upton St. Leonards*, 1847, 10 Q. B. 827). The refusal to accept an office of a public nature, *e.g.* high sheriff (*R.* v. *Woodrow*, 1788, 2 T. R. 731; but see *R.* v. *Grosvenor*, 1743, 1 Wils. 18; and *R.* v. *Shacklington*, 1735, Andr. 201, note) or mayor (*R.* v. *Denison*, 1758, 2 Ken. (Ld.) 259), has also been prosecuted by Information.

Offences against the Administration of Justice.—Offences tending to pervert or interfere with the administration of justice, such as the publica-

tion by a defendant of handbills to influence a jury (see *R.* v. *Jolliffe*, 1791, 4 T. R. 285; 2 R. R. 383; see also *R.* v. *Phillips*, 1764, 3 Burr. 1564); conspiring to obtain a false verdict (see *R.* v. *Opie and Dodge*, 1670, 1 Saund. 486); bribery of a juror (*R.* v. *Young*, cited 2 East, 14); attempting to persuade witnesses not to appear and give evidence (*R.* v. *Lawley*, 1731, 2 Stra. 904), may be the subject of Criminal Informations, but such cases are usually treated as contempts of Court (see CONTEMPT OF COURT; see also EMBRACERY).

Conspiracy, etc.—Criminal Informations lie in some cases of conspiracy to do unlawful acts (see *R.* v. *Green*, 1781, 3 Doug. K. B. 36, where several unreported cases are referred to; *R.* v. *Lynn*, 1733, 2 Barn. 242), such as a conspiracy to raise the price of necessaries of life (see per Lord Mansfield, *R.* v. *Norris*, 1758, 2 Ken. (Ld.) 301), or a conspiracy by certain traders to ruin rivals (see *R.* v. *Hadley*, 1774, 6 Went. Prec. 439; see also *R.* v. *Leigh*, 1774, *ibid.* 443).

Election Offences.—The offences of rioting or intimidation at parliamentary elections (see the *Corporation of Bewdley's* case, 1708, Holt Rep. 353), and bribery or attempting to bribe at parliamentary elections (see *R.* v. *Pitt*, 1762, 3 Burr. 1335; *R.* v. *Isherwood*, 1758, 2 Ken. Ld. 202; *R.* v. *Taylor*, 1700, 12 Mod. 314), have been prosecuted by Criminal Information; so also have similar offences at the election of the mayor of a borough (see *R.* v. *Plympton*, 1724, 2 Raym. (Ld.) 1377; *R.* v. *Spinage*, cited in Black. W. at p. 383; *R.* v. *Mayor of Tiverton*, 1723, 8 Mod. 186). There is now, however, statutory provision for the prosecution of such offences (see CORRUPT PRACTICES).

Bribery.—The offence of bribery at common law is punishable on Information (see *R.* v. *Vaughan*, 1769, 4 Burr. 2494; see also the article BRIBERY).

Breach of the Peace.—Leave to file an Information has been given in some cases of rioting, riotous assembly, or assault tending to the disturbance of the public peace (see *R.* v. *Wroughton*, 1765, 3 Burr. 1683; *R.* v. *Hunt*, 1754, 1 Ken. (Ld.) 108; *Prynn's* case, 1690, 5 Mod. 459; *R.* v. *Gwilt*, 1840, 11 Ad. & E. 587); in the case of rioting and conspiracy to ruin trade (*R.* v. *Hadley*, 6 Went. Prec. 439), or to injure an individual (*R.* v. *Leigh*, *ibid.* 443); sending a challenge tending to provoke a breach of the peace (*R.* v. *Morgan*, 1780, 1 Doug. K. B. 314; *R.* v. *Younghusband*, 1835, 4 Nev. & M. 850; but see *R.* v. *Hankey*, 1757, 1 Burr. 316; *R.* v. *Willett*, 1795, 6 T. R. 294; *R.* v. *Larrien*, 1837, 7 Ad. & E. 277; *R.* v. *Kiernan*, 1855, 1 Cox C. C. 6).

Modern Practice as to granting Criminal Informations.—The foregoing cases are merely intended to be illustrative of the type of cases in which leave to file a Criminal Information has been obtained. They do not, however, in any sense, present an exhaustive category, for the jurisdiction in granting leave for a Criminal Information is discretionary, and the Court may grant leave in any case of serious misdemeanour if the circumstances be such as, in the opinion of the Court, demand the exercise of the extraordinary remedy. But it is an invariable principle not to grant a rule for a Criminal Information upon evidence which would not justify a Grand Jury in finding a true bill of indictment for the same offence (see per Lord Denman, C.J., *Ex parte Williams*, 1841, 5 Jur. 1133). Nor, in general, will a rule be granted against any person for an illegal act committed by him under a *bonâ fide* conviction that he was exercising a legal right (see Stephen, *Digest of Criminal Procedure*, art. 206). And Informations may be refused on the ground that there is some other adequate remedy, civil or criminal (see *R.* v. *Watson*, 1788, 2 T. R. 199; 1 R. R. 461; *R.* v. *Lord*

Vane, 1747, 1 Black. W. 18; *R.* v. *Churchwardens of St. Botolph*, 1763, *ibid.* 443; *R.* v. *Ford*, 1728, 2 Stra. 1130); that the applicant has elected to pursue some other remedy (see *R.* v. *Fielding*, 1759, 2 Burr. 719; *R.* v. *Sparrow*, 1788, 2 T. R. 198; 1 R. R. 459; *R.* v. *Marshall*, 1855, 4 El. & Bl. 475; see, however, *R.* v. *Gwilt*, 1840, 11 Ad. & E. 587); that the matter is too trivial to be the subject of a Criminal Information (see *R.* v. *Proby*, 1756, 1 Ken. (Ld.) 250); that the applicant is equally guilty (see *R.* v. *Peach*, 1758, 1 Burr. 548; see also *R.* v. *Wroughton*, 1765, 3 Burr. 1683); or that there has been unreasonable delay that cannot be accounted for (see *R.* v. *Robinson*, 1764, 1 Black. W. 542; *R.* v. *Murray*, 1837, 1 Jur. 37; see also C. O. R. 1886, r. 48). As to the general reasons for refusing to grant Informations, see per Lord Mansfield, C.J., *R.* v. *Robinson*, 1764, 1 Black. W. 542.

The power of the Court upon motion to grant leave for a Criminal Information is, in fact, in modern times used very sparingly, chiefly in cases of misdemeanour by or against official persons or libels on public men (see Stephen, *General View of the Criminal Law of England*, 2nd ed., 1890, p. 165). And, though a rule for a Criminal Information may be granted for any misdemeanour, Sir James Stephen in epitomising the practice states (*Digest of Criminal Procedure*, 1883, p. 131, art. 206) that it is usually only granted in cases of libels on private individuals when attended with circumstances of aggravation; and illegal acts committed by magistrates, or inferior public officers, from corrupt or vindictive motives, and not merely from ignorance or mistake.

Procedure on Information.—The filing of an *ex officio* Information by the Attorney-General or Solicitor-General has already been noticed (see *ante*). It is now proposed to consider briefly the practice in obtaining leave to file a Criminal Information by a private prosecutor. The subsequent procedure is, in nearly all respects, the same in both classes of Informations, and they will therefore be treated together, any points of difference being indicated.

Application for Criminal Information.—As a general rule, notice of intention to apply for a Criminal Information is not necessary. But no application can be made for a Criminal Information against a justice of the peace for misconduct in his magisterial capacity, unless a notice containing a distinct statement of the grievances, or acts of misconduct complained of, has been served personally upon him, or left at his residence, with some member of his household, six days before the time named in it for making the application (C. O. R. 1886, r. 47; see also *R.* v. *Heming*, 1833, 5 Barn. & Adol. 666; *Ex parte Fentiman*, 1834, 2 Ad. & E. 127; and for form of notice, see C. O. R. 1886, Form No. 29).

The application for a Criminal Information must be made to a Divisional Court by a motion for an order *nisi*, within a reasonable time after the offence complained of (C. O. R. 1886, r. 48; see also *R.* v. *Robinson*, 1764, 1 Black. W. 542; *R.* v. *Murray*, 1837, 1 Jur. 37; *R.* v. *Hext*, 1840, 4 Jur. 339; *R.* v. *Harris*, 1844, 13 L. J. M. C. 162).

Where an application is made for an Information against a justice of the peace for misconduct in his magisterial capacity, the applicant must depose on affidavit to his belief that the defendant was actuated by corrupt motives, and further, if for an unjust conviction, that the defendant is innocent of the charge (C. O. R. 1886, r. 48; see also *R.* v. *Jackson*, 1787, 1 T. R. 653; 1 R. R. 343; *R.* v. *Williamson*, 1820, 3 Barn. & Ald. 582; *Ex parte Fentiman*, 1834, 2 Ad. & E. 127; *R.* v. *Athay*, 1758, 2 Burr. 653; *R.* v. *Webster*, 1789, 3 T. R. 388).

As to the form, contents, stamping, swearing, and filing of the affidavits used on the application, see C. O. R. 1886, rr. 5–27.

An exculpatory affidavit is generally necessary from the person complaining (see *R.* v. *Athay*, 1758, 2 Burr. 653; *R.* v. *Haswell*, 1780, 1 Doug. K. B. 387), but there are some exceptional cases in which it is not required (see, for example, *R.* v. *Dennison*, Lofft, 148; *R.* v. *Williams*, 1822, 5 Barn. & Ald. 595; 24 R. R. 480; see also *R.* v. *Haswell*, 1780, 1 Doug. K. B. 387). When the application is against a magistrate the applicant must depose to his innocence of the offences charged, and, in a case of libel, expressly deny the truth of all the imputations (see *R.* v. *Athay*, 1758, 2 Burr. 653; *R.* v. *Bickerton*, 1722, 1 Stra. 498). The affidavits must afford such evidence as would enable a Grand Jury to find a true bill on indictment (see *R.* v. *Willett*, 1795, 6 T. R. 294).

The application by motion to the Divisional Court for a Criminal Information must be made by counsel, and a prosecutor will not be heard in person (see *R.* v. *JJ. of Lancashire*, 1819, 1 Chit. Rep. K. B. 602; 22 R. R. 823; *R.* v. *Brice*, 1819, 2 Barn. & Ald. 606; *Ex parte Pitt*, 1833, 2 D. P. C. 439).

Cause may be shown against the granting of the rule *nisi*, and defences may be raised at the hearing. If no cause be shown the order will be made absolute upon the affidavit of service. If the order is made absolute it must be drawn up at the Crown Office. The next step is the drawing up and engrossing of the Information. The Information is usually settled by counsel.

No appeal lies from the decision of the Divisional Court in granting or refusing an order *nisi* for a Criminal Information, or in discharging, or making absolute, such an order. It being a criminal matter, the only appeal is for error on the face of the record (see ERROR; see also *R.* v. *Steel*, 1876, 2 Q. B. D. 37).

Form of Information.—The form of Criminal Information given in the Appendix to the Crown Office Rules, 1886 (Form No. 30), is as follows:—

FORM OF CRIMINAL INFORMATION.

Middlesex to wit.

Be it remembered that , Esquire, Coroner and Attorney of our present Sovereign Lady the Queen, in the Queen's Bench Division of Her Majesty's High Court of Justice, before the Queen herself, who for our said Lady the Queen in this behalf prosecutes in his own proper person, comes here into Court before the Queen herself, at the Royal Courts of Justice, London, on [*the day the order was made absolute*]. And for our said Lady the Queen gives the Court here to understand and be informed, that [*state offence and then proceed in the same manner as if it were an indictment*].

Second Count.—And the said Coroner and Attorney of our said Lady the Queen, for our said Lady the Queen, further gives the Court here to understand and be informed that, etc.

(*To conclude.*)

Whereupon the said Coroner and Attorney for our said Lady the Queen prays the consideration of the Court here in the premises, and that due process of law may be awarded against him, the said B. G., in this behalf to make him answer to our said Lady the Queen touching and concerning the premises aforesaid.

(Signed) (Queen's Coroner and Attorney).

FORM OF EX OFFICIO INFORMATION BY THE ATTORNEY-GENERAL.

An *ex officio* Information by the Attorney-General or Solicitor-General is in the same form as that of a Criminal Information given above, using the name of the Attorney-General or Solicitor-General instead of the Queen's Coroner and Attorney (see C. O. R. 1886, Form No. 31), thus—

Be it remembered that Sir Richard Webster, Knight, Attorney-General of our present Sovereign Lady the Queen, who for our said Lady the Queen in this behalf prosecutes, whereupon, etc., the said Attorney-General, etc., *as in the prayer*.

With the exception of the formal parts, a Criminal Information is drawn in the same way as an indictment for the same offence, and the same certainty is required as in an indictment (see Bacon, *Abr.* tit. "Informations" (C); 2 Hawk. *Pleas of the Crown*, ch. 26, s. 4). Subsequently it is engrossed in parchment like an indictment, and then signed by the Master of the Crown Office and filed at the Crown Office. Before process can issue upon the Information recognisances must, as before stated, be entered into and filed at the Crown Office to ensure its prosecution (see C. O. R. 1886, r. 46; see also *R.* v. *Brooke*, 1788, 2 T. R. 190).

Appearance.—The defendant to the Information must enter or cause to be entered in a book at the Crown Office an appearance to the Information (see C. O. R. 1886, r. 83).

The prosecutor may, as against any defendant to an Information, obtain a certificate from one of the officers of the Crown Office of an Information having been filed (see *ibid.* r. 86; for form of such certificate, see *ibid.* Forms Nos. 41 and 42), and upon production of such certificate to a judge he may, if necessary, issue a warrant under his hand to apprehend the defendant, and cause him to be brought before him, or some other judge, or a justice of the peace, to be dealt with according to law (*ibid.* r. 87; for form of warrant, see *ibid.* Forms Nos. 43 and 44). If it be proved upon oath before such judge or justice that the person apprehended and brought before him is the person charged and named in the Information, he may, without further inquiry or examination, be committed to prison by a warrant, or admitted to bail (*ibid.* r. 88; and for form of warrant, see *ibid.* Form No. 45).

Attachment, etc.—When any Information is filed, and the defendant is under terms to appear immediately, and does not enter an appearance, the prosecutor may serve a notice upon him to appear within five days, and in default of appearance may move the Court *ex parte* for leave to enter an appearance for him, or if the notice was personally served for an attachment (*ibid.* r. 90). As to the defendant obtaining bail to avoid arrest, see *ibid.* r. 91; and as to bail after arrest, *ibid.* r. 92. As to entry of appearance to the Information and plea where the defendant is in custody for want of bail, see *ibid.* r. 93.

A subpœna to answer the Information may be issued against the defendant instead of applying for a warrant, and this is the usual practice (see *ibid.* r. 94; for form of subpœna, see *ibid.* Form No. 51); and if the defendant does not appear within four days after the day named in the subpœna to answer, the prosecutor, upon filing an affidavit of service, may issue a writ of attachment (*ibid.* r. 95; for form of affidavit of service to answer an Information, and for form of writ of attachment to answer an Information, see *ibid.* Forms Nos. 53 and 54).

Proceedings in outlawry may be taken to compel an appearance to an Information, but are now rarely, if ever, resorted to (see OUTLAWRY; see also C. O. R. 1886, rr. 99–121).

Discharge of Defendant.—When the defendant is detained in prison for want of bail for his appearance to the Information, and the prosecutor does not proceed within one calendar month after the commitment, the defendant after the expiration of that time must be discharged by order of the Court or a judge upon entering a common appearance to the Information, unless good cause is shown to the contrary; the defendant or his solicitor must give eight days' notice of his intention to apply for such order (*ibid.* C. O. R. 1886, r. 44).

Pleadings.—On the appearance of a defendant to the Information an

order to plead may be drawn up at the Crown Office by the prosecutor or his solicitor (see *ibid.* r. 132). The order to plead expires in ten days after service thereof, but the time may be extended on application by summons to a judge at chambers (see *ibid.* rr. 131, 133). The defendant may plead guilty, or in defence may raise a plea in abatement, a demurrer, a plea of not guilty, or, in cases of libel, a plea of justification. As to the rules with regard to pleading to an Information, see *ibid.* rr. 128–133. See also ABATEMENT; DEMURRER; JUSTIFICATION; LIBEL; PLEA.

Notice of Trial.—Notice of trial must be given before entering the record for trial (C. O. R. 1886, r. 151). The notice of trial must state the place at which the trial is to be held, *e.g.* London or Middlesex, or at the assizes, and the day on or after which the record is to be tried (*ibid.* r. 148; see also rr. 152, 153). Ten days' notice of trial must be given in all cases, unless a longer notice be ordered by the Court or a judge, or the party to whom it is given consents to take short notice of trial, *i.e.* at least four days' notice (*ibid.* rr. 150, 151). If the prosecutor or relator does not, within six weeks after issue joined, or within such extended time as may be allowed, give notice of trial, the defendant may give such notice, and when the defendant is bound by recognisance to give notice of trial, the prosecutor may in all cases give notice by proviso (*ibid.* r. 149).

Entering Record for Trial.—If the prosecutor or relator, after having given notice of trial for London or Middlesex, does not enter the record within six days, the party to whom notice may have been given is at liberty to enter it with the leave of a Court or judge. The record is entered for trial in the same way as actions are entered for trial. For form of record of Criminal Information for trial, see C. O. R. 1886, Form No. 92; and for form of record of *ex officio* Information for trial, see *ibid.* Form No. 93.

If an *ex officio* Information is not brought on for trial within twelve months after the plea of not guilty has been pleaded, the defendant may, on application to the Court in which the prosecution is pending, obtain an order authorising him to bring on the trial, and he may bring on the trial accordingly, unless a *nolle prosequi* has been entered (see the Pleading in Misdemeanour Act, 1819, 60 Geo. III. and 1 Geo. IV. c. 4, s. 9).

Where the prosecutor on any Information not *ex officio* does not proceed to trial within a year after issue joined, or if the prosecutor causes a *nolle prosequi* to be entered, the Court on motion may award the defendant his costs to the amount of the recognisance entered into by the prosecutor on filing the Information (see C. O. R. 1886, r. 49).

Trial.—The trial of an Information is conducted in the same manner as the trial of an indictment at assizes, and the rules as to procedure and evidence are the same (see *R.* v. *Purnell*, 1748, 1 Wils. 239). The trial is in the Queen's Bench Division, on the civil side, or in the Nisi Prius Court at Assizes, before a judge and a common or special jury. A special jury may be obtained either by the prosecutor or the defendant upon giving a similar notice to that required in civil cases (see C. O. R. 1886, r. 158).

The Attorney-General may in the case of an *ex officio* Information demand a trial at bar (see *R.* v. *Johnson*, 1725, 1 Stra. 644), but a trial at bar can only be had by order of the Court (see C. O. R. 1886, r. 160). As to the practice in the cases of trials at bar, which are now extremely rare, see the Crown Office Rules, 1886, rr. 160–165; see also BAR, TRIAL AT.

The Attorney-General at the trial of an *ex officio* Information has the right of reply, but he has not got this right when he appears for a private

prosecutor (see *R.* v. *Horne*, 1777, 20 St. Tri. at p. 660; see also *R.* v. *Bell*, 1829, Moo. & M. 440).

Acquittal.—Where on the trial of the Information the defendant is acquitted by the jury, even where there has been a misdirection, no new trial can be obtained, it being the settled practice that in all cases of a criminal nature where the defendant is in danger of imprisonment no new trial will be granted if the defendant having stood in that danger has been acquitted (see *R.* v. *Duncan*, 1881, 7 Q. B. D. 199, where it was held that upon the trial of an indictment where the defendant was acquitted, a new trial, on the grounds of misreception of evidence, misdirection, and that the verdict was against the weight of evidence, could not be granted).

The acquittal of the defendant at the trial, therefore, terminates the proceedings on the Information.

Sentence.—Where on the trial of an Information the defendant is convicted, if it be an *ex officio* Information the Attorney-General has the right to elect whether sentence shall be passed by the judge who tried the case or shall be postponed to the ensuing term (see C. O. R. 1886, r. 172). But in the case of a conviction on the trial of an Information by a private prosecutor, sentence must be passed by the Queen's Bench Division (see Shortt on *Informations*, p. 86).

A defendant who on the trial of an Information has been found guilty must, as a general rule, be personally present in Court at the time when sentence is pronounced (see *R.* v. *Hann and Price*, 1765, 3 Burr. 1786), though under special circumstances, where a fine only will be inflicted, leave may be obtained on motion to dispense with his personal appearance (see Shortt on *Informations*, p. 92; Cole on *Informations*, p. 100).

As to bringing up a defendant for judgment who after conviction is committed or detained for want of bail, see C. O. R. 1886, r. 45; and as to notice to the defendant to appear to receive sentence where he is not under recognisance, *ibid.* rr. 176, 177).

When a defendant is brought up for sentence on an Information affidavits in mitigation (see *R.* v. *Burdett*, 1821, 4 Barn. & Ald. 314; 23 R. R. 284) or in aggravation (see *R.* v. *Sharpness*, 1786, 1 T. R. 228; 1 R. R. 417; see also *R.* v. *Pinkerton*, 1802, 2 East, 357) may be used. After the notes of the trial have been read the affidavits, if any, produced on part of the defendant are to be read, and then any affidavits produced on the part of the prosecution, after which the counsel for the defendant is heard, and lastly the counsel for the prosecution (see C. O. R. 1886, r. 180; see also *R.* v. *Bunts*, 1788, 2 T. R. 683; *R.* v. *Dignam*, 1837, 7 Ad. & E. 593). The procedure on sentence of a defendant after judgment by default varies slightly. The prosecutor's affidavits must be first read, then the defendant's affidavits, after which the counsel for the prosecution is heard, and lastly the counsel for the defendant (see C. O. R. 1886, r. 181). Where no affidavits are produced, the counsel for the defendant is to be first heard, and then the counsel for the prosecutor (*ibid.* r. 182).

Entry of Verdict, etc.—Upon every trial of an Information, whether at the assizes or at the sittings in London or Middlesex, the Associate, Clerk of Assize, or Master must enter in a book to be kept for that purpose the verdict of the jury, and all such findings of fact, if any, as the judge may direct to be entered, the directions, if any, of the judge as to judgment, the certificates, if any, granted by the judge, and the sentence of the judge if then passed (C. O. R. 1886, r. 171). A certificate, signed by the Associate, of such verdict, finding, or direction, judgment, or sentence, must be filed at the Crown Office by the Associate, and judgment upon the *postea* may

be entered at the Crown Office after the expiration of the time limited for applying for a new trial, or for entering judgment *non obstante veredicto*, or arresting judgment, unless otherwise ordered (*ibid.*; for form of certificate, *ibid.* Form No. 103; as to the *postea* and judgment thereon, see *ibid.* r. 175, and Forms Nos. 104, 105).

Costs.—Where on conviction on Information not *ex officio* a fine is inflicted on the defendant, the private prosecutor is entitled, under the writ of Privy Seal, to a third part of the fine if his costs amount to so much, and if the costs amount to more, the Lords of the Treasury may on petition allow him a further part or the residue of the fine (see Shortt on *Informations*, p. 98; as to the procedure for obtaining one-third of the fine, see *ibid.*).

Where on Information by a private prosecutor for libel judgment is given for the defendant, he is entitled to recover from the prosecutor the costs sustained by him by reason of the Information, and upon a special plea of justification to such Information if the issue be found for the prosecutor, he is entitled to recover from the defendant the costs sustained by the prosecutor by reason of such plea (see C. O. R. 1886, r. 50; see also the Libel Act, 1843, 6 & 7 Vict. c. 96, s. 8; *R.* v. *Steel*, 1876, 1 Q. B. D. 482; *R.* v. *Latimer*, 1850, 15 Q. B. 1077). In other cases, however, costs do not follow the verdict (see Short and Mellor, *Cr. Of. Pr.* p. 275). But if the prosecutor, on any Information not *ex officio*, does not proceed to trial within a year after issue joined, or if the prosecutor causes a *nolle prosequi* to be entered, or if the defendant be acquitted, unless the judge at the time of trial certifies that there was reasonable cause for the Information, the Court, on motion for the same, may award the defendant his costs to the amount of the recognisance entered into by the prosecutor on filing the Information (see C. O. R. 1886, r. 49; see also *R.* v. *Filewood*, 1787, 2 T. R. 145; 1 R. R. 362; *R.* v. *Brooke*, 1788, *ibid.* 190; and as to the proper mode of obtaining such costs, see *R.* v. *Savile*, 1852, 18 Q. B. 703). See further as to costs, Shortt on *Informations*, pp. 98–100; Short and Mellor, *Cr. Of. Pr.* pp. 238–246 and p. 275; see also the article Costs.

New Trial, etc.—A new trial may be moved for where the defendant has been convicted, but in the case of an acquittal the matter is absolutely at an end, and, as before stated, a new trial will not be granted. As to the practice in applications for a new trial, or to enter judgment *non obstante veredicto*, or to arrest judgment, see the Crown Office Rules, 1886, rr. 166–169. The grounds upon which a new trial may be granted are, that there was a wrongful reception or rejection of evidence, misdirection, surprise (see *R.* v. *Whitehouse*, 1852, Dears. C. C. 1), that the verdict was contrary to the evidence, or that there was misbehaviour on the part of the jury (see *R.* v. *Fowler*, 1821, 4 Barn. & Ald. 273; see also 2 Hawk. *Pleas of the Crown*, ch. 47, s. 12).

Error.—As to proceedings by writ of error, for error on the face of the record, and the circumstances under which they may be taken, see the article Error, Writ of. See also as to the practice with regard to proceedings in error, the Crown Office Rules, 1886, rr. 183–215.

General.—The above sketch of the practice on the trial of an Information and of the proceedings previous and subsequent to the trial, is necessarily incomplete; for further detail reference should be made to the Crown Office Rules, 1886, and to the authorities mentioned below.

See also Qui Tam; Quo Warranto.

[*Authorities.*—Comyns, *Digest*, tit. "Information"; Bacon, *Abridgment*, tit. "Informations"; Hawkins, *Pleas of the Crown*, vol. ii. ch. 26; Gude, *Crown Practice*, 1828; Cole on *Informations*, 1843; Shortt on *Informations* (*Criminal and Quo Warranto*), 1887; Short and Mellor, *Crown Office Practice*, 1890; Archbold, *Pleading and Evidence in Criminal Cases*, 21st ed., 1893.]

Informer has primarily the same meaning as informant, but is most commonly applied (1) to accomplices in crime who turn Queen's evidence (see APPROVER; ACCOMPLICE); (2) to common informers, *i.e.* persons who institute legal proceedings with a view to recovering the reward offered by statute in such a case, irrespective of any particular grievance suffered by them through the breach of the statute.

In the case of criminal proceedings, any person may institute proceedings on behalf of the Crown unless a statute otherwise provides. But civil proceedings for penalties by persons not directly aggrieved cannot be instituted unless a statute so permits.

Actions by common informers are termed *qui tam* actions, or popular actions, when the informer recovers the statutory penalty (*tam pro dominâ regînâ quam pro se ipso*). All suits by informers for penalties must be brought within a year of the offence, unless a longer or shorter time is limited by statute (31 Eliz. c. 5, s. 5; *Dyer* v. *Best*, 1866, L. R. 1 Ex. 152). As a general rule, a penalty prescribed by statute goes to the Crown, unless another destination is given it by the statute, whether to the informer or to the poor of the parish, or the metropolitan police fund, or the prosecuting local authority (see *Bradlaugh* v. *Clarke*, 1882, 8 App. Cas. 354; *Huntington* v. *Attrill*, [1893] App. Cas. 150).

Under a very old statute, 28 Edw. I. c. 10, provision is made for punishing false informers.

Actions for penalties by informers are not criminal proceedings for purpose of venue (R. S. C. 1883, Order 20, r. 1), which for civil purposes appears now to be abolished (see *Buckley* v. *Hull Docks Co.*, [1893] 2 Q. B. 93; 56 & 57 Vict. c. 61, s. 2). But discovery of documents or by interrogatories will not be given (see *Hobbs* v. *Hudson*, 1890, 25 Q. B. D. 232; *Saunders* v. *Wiel*, No. 1, [1892] 2 Q. B. 321; *Mexborough* (*Earl*) v. *Whitwood Urban District Council*, [1897] 2 Q. B. 111), and such actions may not be compromised without the leave of the Court (R. S. C. 1883, Order 50, rr. 13, 14, 15). A collusive action is unlawful and ineffectual (4 Hen. VII. c. 20; *Girdlestone* v. *Brighton Aquarium Co.*, 1878, 3 Ex. D. 137; 4 Ex. D. 107). Corporations cannot sue as common informers for penalties except under express statutory authority (18 Eliz. c. 5, s. 7; *Shoreditch Guardians* v. *Franklin*, 1878, 3 C. P. D. 377), nor is this rule altered by the Interpretation Act, 1889 (52 & 53 Vict. c. 63, s. 2 (2)).

See PENAL ACTION.

Infortuniam, Homicide per—Homicide committed in the course of doing a lawful act, and without any intention of doing hurt, as, for example, when the head of an axe with which a person is at work accidentally flies off and kills a bystander. Under the old law, if a person was found guilty of having committed homicide *per infortuniam*, or, as it is more generally termed, by misadventure, he was technically liable to the penalty of forfeiture of his goods, but in practice he obtained a pardon and writ of

restitution as a matter of course; sometimes, indeed, the judge would permit or direct a general verdict of acquittal (4 Black. *Com.* 182, 188). By sec. 7 of 24 & 25 Vict. c. 100, it is, however, expressly provided that no punishment or forfeiture shall be incurred by any person who shall kill another by misfortune, or in his own defence, or in any other manner without felony. See HOMICIDE.

Infringement.—See COPYRIGHT; DESIGNS; PATENTS; TRADE MARKS.

In full.—Where a landlord promised his tenant that if he would continue to pay his rent in full without deducting anything for property tax, he, the landlord, would repay to him all sums which he had paid or should pay for such property tax, it was held that this agreement was not void as "an agreement for the payment of rent in full" within sec. 103 of 5 & 6 Vict. c. 35 (*Lamb* v. *Brewster*, 1879, 48 L. J. Q. B. 421).

The keeping by a creditor of a cheque sent by his debtor "in full of all demands" is not as a matter of law conclusive evidence of accord and satisfaction (*Day* v. *M'Lea*, 1889, 22 Q. B. D. 610). See vol. i. p. 70.

"In full for the voyage," see *Sweeting* v. *Darthez*, 1854, 23 L. J. C. P. 131. See FULL.

Ingiurie gravi.—These words in the 46th Article of Ordinance No. 5 of 1867, "to amend the laws relative to the rights and duties emanating from marriage and to separation of married persons" in Malta, "leave a large discretion to the tribunal having to judge of the facts; not only acts, but words designed to wound the feelings of the wife—where . . . she is the complaining party—may amount to '*ingiurie gravi*'" (per Sir James Hannen in *Sant* v. *Sant*, 1874, L. R. 5 P. C. 542).

In gremio legis (lit. "in the bosom of the law").—A figurative expression to express that a thing is under the protection of the law.

Ingress.—A grant of a right of "ingress, egress, and regress" is a grant of a right of way from the *locus a quo* to the *locus ad quem*, and from the *locus ad quem* forth to any other spot to which the grantee may lawfully go to the *locus a quo* (*Somerset* v. *G. W. Ry.*, 1882, 46 L. T. 883).

Inhabitants. — In *A.-G.* v. *Parker*, 1747, 3 Atk. 576, where one of the questions was as to the persons entitled to nominate to a curacy, which right had been granted to the "parishioners and inhabitants," Lord Hardwicke said (p. 577): "Inhabitants . . . takes in housekeepers, though not rated to the poor, takes in also persons who are not housekeepers, as, for instance, such who have gained a settlement and

by that means become inhabitants" (see also *A.-G.* v. *Clarke*, 1762, Amb. 422).

Persons who, although occasionally absent from a borough on service as militiamen, but who had dwelling-houses therein for which they paid rent, and in which their families continued to reside, were deemed "inhabitants" of the borough for the purpose of voting for certain corporate offices (*R.* v. *Mitchell*, 1809, 10 East, 511). The word, however, in a charter has not in itself any definite legal meaning, but must be explained in each case extrinsically, as by evidence of usage or by reference to the context and objects of the charter (*R.* v. *Mashiter*, 1837, 6 Ad. & E. 153; *R.* v. *Davie*, 1837, *ibid.* 374).

"In a statute which mentions 'inhabitant' as well as 'occupier,' inhabitant must mean resident" (per Bayley, J., in *R.* v. *Nicholson*, 1810, 12 East, 345; 11 R. R. 398). The term "may have a very extensive sense, so as to include in it all persons possessed of property in a place. Such a construction has been put upon that word in the Statute of Bridges, the Riot Act, and the Black Act; but in those statutes the word 'inhabitants' was the only word used as descriptive of the persons liable to be charged" (per Bayley, J., in *R.* v. *North Curry*, 1825, 4 Barn. & Cress. 958, who then proceeds to deal with the word as used in 43 Eliz. c. 2, which he says, following *R.* v. *Nicholson* (*supra*), is confined to residents). "Since the time of Henry VIII. the word 'inhabitant,' when used in statutes relative to rates, has always been construed to mean 'rateable occupier,' and I do not know of an instance in which it has been decided that it must be a person who has resided and slept within the parish. In respect of gaining a settlement, it is otherwise, and there the person is required for that purpose to have slept in the parish" (per Erle, C.J., in *Wilson* v. *Sunderland Churchwardens*, 1864, 34 L. J. M. C. 90, 93).

A legacy to the "poor inhabitants" of a parish is good, and will go to the poor not receiving alms (*A.-G.* v. *Clarke*, *supra*); so also is a gift of residue to, *e.g.*, "the inhabitants of Tawleaven Row in the parish of Setlney" (*Rogers* v. *Thomas*, 1837, 2 Keen, 8). A claim to a *profit à prendre* cannot be made by the inhabitants of a parish, nor can a grant be made to the inhabitants as such, for although they may be all capable of taking individually as grantees, yet they cannot take under that general designation (Shep. *Touchstone*, 237; *Willingale* v. *Maitland*, 1866, L. R. 3 Eq. 103); this, however, applies solely to grants by private individuals, and not to grants by the Crown. A grant by the Crown to the inhabitants of a parish erects the inhabitants into a corporation *quoad* the grant (*Willingale* v. *Maitland*, *supra*; see also *Chilton* v. *London Corporation*, 1878, 7 Ch. D. 735).

In *Booth* v. *Howell*, 1889, 5 T. L. R. 449, it was decided that a by-law made by a local authority prohibiting the use in a highway or public place of "any noisy instrument to the annoyance of any of the inhabitants of the borough" was reasonable, as the words "any of the inhabitants" meant a reasonable number of inhabitants, and did not apply to the case of one inhabitant being annoyed; see, however, *Innes* v. *Newman*, [1894] 2 Q. B. 292 (in which *Booth* v. *Howell*, *supra*, was not cited), where on a similar by-law it was held that it was sufficient to prove that one inhabitant had been annoyed.

Inhabitant occupier, see FRANCHISE, ELECTORAL.

[*Authority.*—Stroud, *Jud. Dict.*]

Inhabited House Duty.—See HOUSE TAX.

Inheritance. — The rules governing the descent of freehold estates are contained in the Inheritance Act, 1833, which statute, however, does not apply to any descent on the death of a person who died before the year 1834; for the former rules of descent, see 2 Black. *Com.* c. 14. The canons of descent under the Act of 1833 are as follows:—(1) Descent is traced from the last "purchaser," that is, "the person who last acquired the land otherwise than by descent, or than by any escheat, partition, or enclosure, by the effect of which the land shall have become part of or descendible in the same manner as other hand acquired by descent" (s. 1); (2) the land in the first place descends lineally to the issue of the purchaser *in infinitum*; (3) male issue are admitted before the female; (4) of two or more males who are in equal degree of consanguinity, the eldest only takes; but females in the like case inherit all together; (5) lineal descendants *in infinitum* of any person deceased represent their ancestor; (6) on failure of descendants the inheritance goes to the nearest lineal ancestor; (7) among the lineal ancestors of the purchaser the paternal line is preferred to the maternal; (8) in the admission of female paternal ancestors the mother of the more remote male paternal ancestor and her heirs are preferred to the mother of a less remote male paternal ancestor and her heirs, and the same applies in the admission of female maternal ancestors; (9) relations of the whole blood are preferred to those of the half blood; (10) "where there shall be a total failure of heirs of the purchaser, or where any land shall be descendible as if an ancestor had been the purchaser thereof, and there shall be a total failure of the heirs of such ancestor, then and in every such case the land shall descend and the descent shall thenceforth be traced from the person last entitled to the land as if he had been the purchaser thereof" (Law of Property Amendment Act, 1859, s. 19).

For a full analysis of the foregoing rules, see REAL PROPERTY, *Descent of*.

It should be noted that by the Land Transfer Act, 1897, which came into force on 1st January 1898, real estate vested in any person, other than as a joint tenant, devolves on his death, notwithstanding any testamentary disposition, on his personal representative as if it were a chattel real (s. 1); but this applies only in cases of death after the commencement of the Act (*ibid.*). Executors or administrators of a deceased person will hold his real, like his personal, estate as trustees for those beneficially entitled thereto, who shall have the same power of acquiring a transfer of the real estate as persons beneficially entitled to personal estate have of acquiring a transfer of such personal estate (s. 2). See LAND TRANSFER.

Inhibition.—An inhibition is a writ to forbid a judge from further proceeding in a case depending before him, being in the nature of a prohibition. This writ most commonly issues out of a higher Court Christian to an inferior upon an appeal. But there are likewise inhibitions on the visitations of archbishops and bishops; thus, when the archbishop visits, he inhibits the bishop; and, when the bishop visits, he inhibits the archdeacon, and this is to prevent confusion. The grant of inhibitions is regulated by canons 96, 97, and 98 of 1603. As to the practice, see per Sir John Nicholl in *Herbert* v. *Herbert*, 1817, 2 Phillim. 430, at p. 443, and per P. C. in *Ridsdale* v. *Clifton*, 1876, 1 P. D. 383.

The term "inhibition" is by modern usage also applied to an order, in the nature of a suspension *ab officio*, made against a spiritual person, not as a punitive sentence, but as a means to compel the observance of some legal or canonical duty. The word is thus used in the Church Discipline Act, 1840 (3 & 4 Vict. c. 86), s. 14; the Sequestration Act, 1871 (33 & 34 Vict. c. 45), s. 5; and the Public Worship Regulation Act, 1874 (37 & 38 Vict. c. 85), s. 13. See also the Clergy Discipline Act, 1892 (55 & 56 Vict. c. 32), s. 10 and Sched.

[*Authorities.*—Gibs. *Codex*, ii. 1839; Ayliffe, *Parergon*, 297; Stephens, *Laws relating to Clergy*, i. 572; Phil. *Eccl. Law*, 2nd ed., ii. 977.]

In his own Right.—Where the requisite qualification for the office of director is the holding by a person of a certain number of shares "in his own right," it is not necessary that the shares should be held by such person as beneficial owner (*Pulbrook* v. *Richmond Consolidated Mining Co.*, 1878, 9 Ch. D. 610). In *Bainbridge* v. *Smith*, 1889, 41 Ch. D. 462, Cotton, L.J., dissented from the view expressed in *Pulbrook* v. *Richmond Consolidated Mining Co.*, *supra*, and expressed an opinion that the phrase meant beneficial ownership, while in the same case Lindley, L.J., said that as the phrase had acquired by usage and upon the strength of the decision in *Pulbrook's* case, *supra*, a conventional meaning, he was not prepared to overrule the construction put upon it in that case; that conventional meaning, he considered, was this, "that a person holding shares in his own right means holding in his own right as distinguished from holding in the right of somebody else. I do not think the test is beneficial interest, the test is being on or not being on the register as a member, *i.e.* with power to vote, and with those rights which are incidental to full membership. It means that a person shall hold shares in such a way that the company can safely deal with him in respect of his shares whatever his interest may be in the shares." The view taken in that case by Lindley, L.J., that the construction which had been generally acted upon should not be disturbed, was approved in *Cooper* v. *Griffin*, [1892] 1 Q. B. 740, and in *Howard* v. *Sadler*, [1893] 1 Q. B. 1).

The phrase, as it occurs in sec. 14 of 1 & 2 Vict. c. 110 (which enables a judgment creditor to obtain a charging order on the shares of his debtor "standing in his name in his own right, or in the name of any person in trust for him"), means that the shares must be held by the debtor as beneficial owner (*Cooper* v. *Griffin*, *supra*; *Howard* v. *Sadler*, *supra*).

Initials.—It seems that initials intended to represent the name of the party to be charged are a sufficient signature within the Statute of Frauds (Smith, *Leading Cases*, 10th ed., vol. i. 322); they are sufficient under the Wills Act (*Hindmarsh* v. *Charlton*, 1861, 8 H. L. 171; *In the goods of Blewitt*, 1880, 5 P. D. 116).

Initiate.—A person is said to become tenant by the curtesy *initiate* in his wife's estate of inheritance on the birth to him by such wife of a child capable of inheriting the estate; tenancy by the curtesy is not, however, *consummate* till the death of the wife (2 Black. *Com.* 127, 128).

Injunction.

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Definition.—An injunction is a judicial process, by which one who has invaded or is threatening to invade the rights, legal or equitable, of another, is restrained from continuing or commencing such wrongful act.

I. Jurisdiction.

(a) *Before the Judicature Acts.—In Equity.*—The jurisdiction to grant injunctions was originally confined to the Court of Chancery, in which Court injunctions were of two kinds—those known as *common* and *special* injunctions respectively, the former being such as were usually obtained where the object was to stay proceedings at law. The Chancery Procedure Act, 1852 (15 & 16 Vict. c. 86), s. 58, abolished the *common* injunction, and, until the change of practice introduced by the Judicature Act, all injunctions issued by the Court of Chancery were *special* (Joyce on *Injunctions*, p. 1).

The remedy by injunction was purely equitable, and was not recognised in the Courts of common law. Indeed, the jurisdiction in equity had its origin in the fact that there was either no remedy at all at law, or the remedy was imperfect and inadequate (Story's *Equity Jurisprudence*, p. 573).

At Law.—This infirmity in the jurisdiction of the Courts of common law, and their inability to restrain violations of legal rights by injunction in cases where Courts of equity afforded that protection, was long felt to be a hardship on the suitors. Complaints in this direction, urged by the Common Law Commissioners of 1831, were repeated and insisted upon by their successors, the Commissioners of 1850 (Second Report, pp. 42–44). At length some measure of relief was afforded by the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), by ss. 79–82 of which statute a limited power of granting injunctions, confined to actions in which some breach of contract or duty was complained of, was conferred on the Courts of law. The jurisdiction, however, was not so extensive as that exercised in Courts of equity, for under the Common Law Procedure Act it was necessary to wait until a wrongful act had actually been commenced, so that an action for damages might be maintained before an application could be made for an injunction, whereas the danger of such an injury was enough to found the jurisdiction of a Court of equity (Third Report of Commissioners, 1860, p. 9; Day's *Common Law Procedure Acts*, pp. 9–11).

In addition to the general power of granting injunctions thus conferred on Courts of law by the Common Law Procedure Act, 1854, those Courts had statutory jurisdiction of a similar character by virtue of various modern Acts of Parliament. Thus, in respect of patents, the Superior Courts of record at Westminster could grant injunctions under the Patent Law Amendment Act, 1852 (15 & 16 Vict. c. 83), s. 42. Under the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), s. 3, the Court of Common Pleas, and, under the Merchandise Marks Act, 1862 (25 & 26 Vict. c. 88), ss. 21, 22, the Courts of law generally, were enabled to apply the remedy by injunction for enforcing their respective provisions.

(b) *Under the Judicature Acts.*—These distinctions between the powers of Courts of law and Courts of equity have now no more than an historical interest, for, by virtue of the 25th section of the Judicature Act, 1873 (36 & 37 Vict. c. 66), all the Divisions of the Supreme Court of Judicature have jurisdiction to grant injunctions.

The power is conferred by subsec. 8 of the above section, which is in the following terms:—

> A mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made; and any such order may be made either unconditionally or upon such terms and conditions as the Court shall think just; and if an injunction is asked, either before, or at, or after the hearing of any cause or matter, to prevent any threatened or apprehended waste or trespass, such injunction may be granted, if the Court shall think fit, whether the person against whom such injunction is sought is or is not in possession under any claim of title or otherwise, or (if out of possession) does or does not claim a right to do the act sought to be restrained under any colour of title; and whether the estates claimed by both or by either of the parties are legal or equitable.

The above subsection has been much discussed, and has received judicial interpretation in many cases, from a consideration of which the following principles can be deduced:—

(1) The section confers no new power on the Court, to the extent of altering the rights of parties, or the principles on which the jurisdiction in injunction is exercised. Nor does it enable the Court to grant an injunction where before the Act no Court could have given any remedy at all.

(2) Subject to the above restrictions, the power of the Court to grant injunctions is unlimited, wherever it can be shown to be "just or convenient" that the jurisdiction should be exercised.

The reported decisions afford a wealth of authority in support of these propositions. It is not, however, possible to do more than refer to a few of the leading cases which have established the principles.

No new Power conferred on the Court—Cases.—In *Day* v. *Brownrigg*, 1878, 10 Ch. D. 294, an injunction was sought by the plaintiff to restrain the defendant from calling his house by the same name as that by which the plaintiff's house had been known for a period of sixty years. The injunction was refused, on the ground that no damage was alleged, and no legal right alleged, the violation of which was the cause of damage. "The power given to the Court by sec. 25, subsec. 8 of the Judicature Act, 1873, to grant an injunction in all cases in which it shall appear to the Court to be just or convenient to do so, does not in the least alter the principles on which the Court should act" (per James, L.J., p. 307; see, too, *Street* v. *Union Bank of Spain and England*, 1885, 30 Ch. D. 150).

In *Gaskin* v. *Balls*, 1879, 13 Ch. D. 324, the Court of Appeal refused to order a mandatory injunction to pull down buildings erected by the predecessor in title of the defendant, in breach of restrictive covenants against building beyond a certain building line, and which had been allowed to remain without complaint for five years. "The Act," said Thesiger, L.J., "has somewhat enlarged the powers of the Court, but in the matter of injunctions it has done nothing to alter the principles which have been laid down as to the exercise of its powers, where principles have been established as being just and convenient" (p. 329).

In *North London Rwy. Co.* v. *Great Northern Rwy. Co.*, 1883, 11 Q. B. D. 30, it was held that the High Court has no jurisdiction to issue an injunction to restrain a party from proceeding with an arbitration in a

matter beyond the agreement to refer, although such arbitration proceeding may be futile and vexatious. "The words 'just or convenient' do not increase the power of any part of the High Court to the extent of altering the rights of parties, so as to give to either a right which did not exist in law at all before the Judicature Act. Therefore, in my opinion, there is nothing in the Judicature Act which enables any part of the High Court to issue an injunction in a case in which before the Judicature Act there was no legal right on the one side or no legal liability on the other at law or in equity" (per Brett, L.J., pp. 37, 38). "In my opinion all that was done by the section was to give to the High Court power to give a remedy which formerly would not have been given in that particular case, but still only a remedy in defence of or to enforce rights which, according to law, were previously existing and capable of being enforced in some or one of the different Divisions which are now united in the High Court. In my opinion the sole intention of the section is this: that, where there is a legal right which was independently of the Act capable of being enforced, either at law or in equity, there, whatever may have been the previous practice, the High Court may interfere by injunction in protection of that right" (per Cotton, L.J., pp. 39, 40; see also *London and Blackwall Rwy. Co.* v. *Cross*, 1885, 31 Ch. D. 354; *Kitts* v. *Moore*, [1895] 1 Q. B. 253).

In *Harris* v. *Beauchamp*, [1894] 1 Q. B. 801, Davey, L.J., said, "We conceive these well-known words ' (*i.e.* "just or convenient") " do not confer an arbitrary or unregulated discretion on the Court, and do not authorise the Court to invent new modes of enforcing judgments in substitution for the ordinary modes" (p. 809).

To what extent Jurisdiction is enlarged.—Whilst, however, it is true that the Judicature Act has not enlarged the jurisdiction of the Court in the sense of altering the rights of parties, and enabling them to obtain relief by injunction, where under the former practice they could have claimed no relief at all, yet, in another sense, there certainly has been an enlargement of jurisdiction, to the extent of enabling an injunction to be granted where that particular mode of relief was not before available to a plaintiff. Thus, by the express terms of the subsection, certain technical difficulties which affected the right to an injunction in the case of "threatened or apprehended waste or trespass" have been removed (see *Stocker* v. *Planet Building Society*, 1879, 27 W. R. 793). Again, whilst formerly the Court of Chancery had no jurisdiction to restrain the publication of a libel, even though injurious to property (*Prudential Assurance Co.* v. *Knott*, 1874, L. R. 10 Ch. 142), sec. 25 (8) of the Judicature Act has enlarged the jurisdiction so as to enable any Division of the High Court in a proper case to interfere by injunction, and restrain a libel, either before or at the trial, and without proof of actual damage, and that whether the libel affects trade and property, or character only (*Saxby* v. *Easterbrook*, 1878, 3 C. P. D. 339; *Thorley's Cattle Food Co.* v. *Massam*, 1877, 6 Ch. D. 582; 1880, 14 Ch. D. 763; *Thomas* v. *Williams*, 1880, 14 Ch. D. 864; *Quartz Hill Co.* v. *Beall*, 1882, 20 Ch. D. 501; *Liverpool Household Stores* v. *Smith*, 1887, 37 Ch. D. 170; *Bonnard* v. *Perryman*, [1891] 2 Ch. 269; *Salomons* v. *Knight*, [1891] 2 Ch. 294; *Monson* v. *Tussaud*, [1894] 1 Q. B. 671). The jurisdiction, however, is one to be exercised with great caution, and not in general, unless the applicant satisfies the Court that the statements are untrue (*Quartz Hill Co.* v. *Beall*, *ubi supra*). As to granting an interlocutory injunction to restrain libels, see *infra* under the head INTERLOCUTORY INJUNCTIONS.

Jurisdiction wherever "just or convenient."—Subject to the limitations on

the exercise of the jurisdiction by the Court arising from the fact that old and well-established principles must be adhered to, and care taken that new rights are not conferred, nor new liabilities created, the sole question for the consideration of the Court is in all cases whether it is just or convenient that an injunction should be granted. If this condition is fulfilled, all acts which a Common Law Court, or a Court of equity only, could formerly restrain by injunction, can now be restrained by the High Court. This proposition is illustrated by the following amongst many other cases:—

In *Beddow* v. *Beddow*, 1878, 9 Ch. D. 89 (in which the Court granted an injunction to restrain an arbitrator from acting), Jessel, M. R., thus stated the principle: "There is unlimited power to grant an injunction in any case where it would be right or just to do so, and what is right or just must be decided, not by the caprice of the judge, but according to sufficient legal reasons, or on settled legal principles" (p. 93).

The interference of the Court is no longer confined to cases where there is some question of property; there may be cases in which the Court would interfere, even when personal status is the only thing in question (per Jessel, M. R., *Aslatt* v. *Corporation of Southampton*, 1880, 16 Ch. D. p. 148).

In *Cooper* v. *Whittingham*, 1880, 15 Ch. D. 501, it was held that where a statute creates a new offence and imposes a penalty, the ancillary remedy by injunction may still be claimed. And Jessel, M. R., stated that the sub-section may be said to be a general supplement to all Acts of Parliament (p. 507). See this case commented on by Chitty, J., in *Hayward* v. *East London Waterworks Co.*, 1884, 28 Ch. D. 138.

Where independently of the section there is a legal right which can be enforced either at law or in equity, a Court of equity has jurisdiction under the subsection to grant an injunction in protection of that right (*Richardson* v. *Methley School Board*, [1893] 3 Ch. 510).

Where the Court has power to grant prohibition it may now grant an injunction to restrain proceedings in an inferior Court, for one main object of the Judicature Act is to enable the Court to decide in one proceeding all the questions in dispute, and the jurisdiction now conferred on every judge of granting prohibition is a reason for granting an injunction, which is a shorter and cheaper mode of attaining the same end (*Hedley* v. *Bates*, 1880, 13 Ch. D. 498; *Stannard* v. *Vestry of St. Giles, Camberwell*, 1882, 20 Ch. D. 190).

In ascertaining what is "just," regard must be had to what is "convenient" (*Beddow* v. *Beddow*, 1878, 9 Ch. D. p. 93).

"*By Interlocutory Order.*"—The expression in the subsection "by interlocutory order" does not mean that the power of the Court is limited to granting an order on application before the trial. It means an order other than final judgment in an action, whether such order be made before judgment or not (*Smith* v. *Cowell*, 1880, 6 Q. B. D. 75). "If this can be done by interlocutory application, *à fortiori*, it can be done at the trial of the action, on the principle of *omne majus continet in se minus*" (*Beddow* v. *Beddow*, 1878, 9 Ch. D. p. 93; *Anglo-Italian Bank* v. *Davies* 1878, 9 Ch. D. p. 287).

No Power to restrain Proceedings in another Division.—The power which was formerly exercised by the Court of Chancery of restraining proceedings at law is abolished by sec. 24 (5) of the Judicature Act, 1873, which is in the following terms:—

> No cause or proceeding at any time pending in the High Court of Justice, or before the Court of Appeal, shall be restrained by prohibition or injunction; but every matter of equity on which an injunction against the prosecution of any

> such cause or proceeding might have been obtained, if this Act had not passed, either unconditionally or on any terms or conditions, may be relied on by way of defence thereto: Provided always, that nothing in this Act contained shall disable either of the said Courts from directing a stay of proceedings in any cause or matter pending before it if it shall think fit; and any person, whether a party or not to any such cause or matter, who would have been entitled, if this Act had not passed, to apply to any Court to restrain the prosecution thereof, or who may be entitled to enforce, by attachment or otherwise, any judgment, decree, rule, or order, contrary to which all or any part of the proceedings in such cause or matter may have been taken, shall be at liberty to apply to the said Courts respectively, by motion in a summary way, for a stay of proceedings in such cause or matter, either generally, or so far as may be necessary for the purposes of justice; and the Court shall thereupon make such order as shall be just.

See *Garbutt* v. *Fawcus*, 1875, 1 Ch. D. 155; *Wright* v. *Redgrave*, 1879, 11 Ch. D. 24.

One result of the section is that any application under sec. 85 of the Companies Act, 1862 (25 & 26 Vict. c. 87), as, *e.g.*, to restrain proceeding with an execution against a company, pending the hearing of a winding-up petition, must be made in the Division to which the action is attached, and not in the Chancery Division (*In re Artistic Colour Printing Co.*, 1880, 14 Ch. D. 502). And the practice in this respect is not altered by the Companies (Winding-Up) Act, 1890 (53 & 54 Vict. c. 63) (*In re General Service Co-operative Stores*, [1891] 1 Ch. 496).

Though, however, the section prevents an application being successfully made to one Division of the High Court to restrain an action pending in another Division, yet an injunction can be obtained restraining the institution of proceedings (*Besant* v. *Wood*, 1879, 12 Ch. D. 605; *Hart* v. *Hart*, 1881, 18 Ch. D. 670).

Jurisdiction of County Courts.—Under sec. 89 of the Judicature Act, 1873, a County Court can in actions within its jurisdiction grant an injunction (*Martin* v. *Bannister*, 1879, 4 Q. B. D. 491); but cannot stay proceedings in the High Court (*Cobbold* v. *Pryke*, 1879, 4 Ex. D. 315).

Injunction against Repetition of Wrongful Act, etc.—In any cause or matter in which an injunction has been or might have been claimed, the plaintiff may, before or after judgment, apply for an injunction to restrain the defendant or respondent from the repetition or continuance of the wrongful act or breach of contract complained of, or from the commission of any injury or breach of contract of a like kind relating to the same property or right, or arising out of the same contract; and the Court or judge may grant the injunction, either upon or without terms, as may be just (R. S. C. 1883, Order 50, r. 12). The above rule is founded on secs. 79 and 82 of the Common Law Procedure Act, 1854.

II. Injunctions Generally.

Where the Remedy obtainable.—It does not fall within the scope of this article to discuss the various classes of wrongs for which relief by injunction is obtainable. To do that it would be necessary to travel over the whole of that wide field of equitable jurisdiction which has for its object the redress of actionable injuries, where such redress does not sound merely in damages; for "the very first principle of injunction law is that you do not obtain injunctions for actionable wrongs for which damages are the proper remedy" (per Lindley, L.J., *London and Blackwall Rwy. Co.* v. *Cross*, 1888, 31 Ch. D. p. 369).

In this connection the words of an early writer of no small repute may be quoted. Speaking of the writ of injunction, he says that the most

ordinary objects of it may be enumerated thus: "To stay proceedings in Courts of law, in spiritual Courts, the Courts of Admiralty, or in some other Court of equity; to restrain the indorsement or negotiation of notes and bills of exchange, the sale of land, the sailing of a ship, the transfer of stock, or the alienation of a specific chattel; to prevent the wasting of assets or other property pending litigation, to restrain a trustee from assigning the legal estate, from setting up a term of years, or assignees from making a dividend; to prevent the removing out of the jurisdiction, marrying, or having any intercourse which the Court disapproves of, with a ward; to restrain the commission of every species of waste to houses, mines, timber, or any other part of the inheritance; to prevent the infringement of patents, and the violation of copyright either by publication or theatrical representation; to suppress the continuance of public or private nuisances; and by the various modes of interpleader, restraint upon multiplicity of suits, or quieting possession before the hearing, to stop the progress of vexatious litigation. These, however, are far from being all the instances in which this species of equitable interposition is obtained. It would indeed be difficult to enumerate them all, for in the endless variety of cases in which a plaintiff is entitled to equitable relief, if that relief consists in restraining the commission or the continuance of some act of the defendant, a Court of equity administers it by means of the writ of injunction" (Eden on *Injunctions*, 1821, pp. 1, 2). If these words were true when the jurisdiction to grant injunctions was confined to one of many Courts, with how much greater force do they apply, when, as now, the power is vested in every Division of one great consolidated Court?

Principal Heads of Jurisdiction.—There are, however, two main heads under which the jurisdiction of the Court by injunction may be invoked:—

To restrain breaches of Contracts.—(1) Where the object is to restrain the breach of a contract, either expressed or implied. "Where there is a contract to abstain from doing a specific thing, and the damages sustained by its violation cannot be estimated in money, the Court will by injunction restrain a party from doing the thing that he has promised not to do, and thus enforce performance of the contract or prevent a breach of it" (Addison on *Contracts*, p. 281). If a contract be affirmative in form, the usual and appropriate remedy is specific performance; but if it be negative, an injunction can be obtained to restrain a breach of it. In enforcing a negative covenant a Court of equity has no jurisdiction to exercise. If parties for valuable consideration with their eyes open contract that a particular thing shall not be done, all that the Court has to do is to say by way of injunction, that which the parties have already said by way of covenant, that the thing shall not be done; and in such case the injunction does nothing more than give the sanction of the process of the Court to that which already is the contract between the parties. It is not then a question of the balance of convenience or inconvenience, or of the amount of damage or injury—it is the specific performance by the Court of that negative bargain which the parties have made with their eyes open between themselves (per Cairns, L.C., *Doherty* v. *Allman*, 1878, 3 App. Cas. p. 720). A covenant which, though positive in terms, is negative in character, can be enforced by injunction (*Catt* v. *Tourle*, 1869, L. R. 4 Ch. 654); and conversely, a contract, negative in terms, but in character and substance affirmative, cannot be so enforced (*Davis* v. *Foreman*, [1894] 3 Ch. 654). If an agreement be separable—that is, positive in some of its provisions and negative as to others—even though the Court may not be able to grant specific performance of the

positive part, it yet can restrain by injunction a breach of the negative covenants (see *Lumley* v. *Wagner*, 1852, 1 De G., M. & G. 604; *Whitwood Chemical Co.* v. *Hardman*, [1891] 2 Ch. 416). To this head of jurisdiction are referable those very numerous cases in which the Court interferes to prevent breaches of covenants in restraint of trade, or of restrictive covenants in leases, conveyances, and the like. As to the principles on which the Court acts, and as to injunctions to restrain the breach of covenants and agreements generally, see Kerr, pp. 426–486; Seton, pp. 463–471.

To restrain the commission of Torts.—(2) Where the object is to prevent the commission of a wrong independent of contract. The following are some of the principal kinds of torts against which the remedy by injunction is available: waste, trespass, nuisances of various kinds (as by interference with rights of light, water, and the like), infringement of patents, trade marks, trade names, or copyrights. In each of such cases the action of the Court is governed by well-recognised principles. "All of them, however, are developments of the general principle that an injunction is granted only where damages would not be an adequate remedy" (Pollock on *Torts*, p. 187). As to this head of injunctions, see Joyce on *Injunctions*; Kerr on *Injunctions*; Seton, pp. 471 *et seq.*

Discretion.—"The granting or refusing an injunction is a matter resting in the sound discretion of the Court, and in exercising that discretion the Court will consider amongst other things, whether the doing of the thing sought to be restrained must produce an injury to the person seeking the injunction, and consequently no injunction will be granted whenever it will operate oppressively or inequitably or contrary to the real justice of the case, or where it is not the fit and appropriate mode of redress under all the circumstances of the case, or where it will or may work an immediate mischief or fatal injury" (Story's *Equity Jurisprudence*, p. 623). See *Doherty* v. *Allman*, 1878, 3 App. Cas. 709.

Threatened Damage.—Where the aid of the Court is sought to restrain the threatened violation of a legal right, it must be established that there is either an actual intention to do the act complained of, or a claim of right to do the act put forward and insisted upon, and that the intended act, if done, will inevitably (that is, in all reasonable probability) be a violation of the legal right (*Haines* v. *Taylor*, 1847, 2 Ph. 209; *A.-G.* v. *Forbes*, 1856, 2 Myl. & Cr. 123, 132; *Tipping* v. *Eckersley*, 1855, 2 Kay & J. 264; *Cooper* v. *Whittingham*, 1880, 15 Ch. D. 501; *Pattisson* v. *Gilford*, 1874, L. R. 18 Eq. 259; *A.-G.* v. *Acton Local Board*, 1882, 22 Ch. D. 221; *Shafto* v. *Bolckow, Vaughan, & Co.*, 1887, 34 Ch. D. 725; *Goodhart* v. *Hyett*, 1883, 25 Ch. D. 182). Thus in a *quia timet* action, the Court will not interfere to prevent a threatened trespass, unless, in the absence of actual damage, there be proof of imminent danger, and that the apprehended danger will, if it comes, be irreparable (*Fletcher* v. *Bealey*, 1885, 28 Ch. D. 688; and see *Salvin* v. *North Brancepeth Coal Co.*, 1874, 9 Ch. D. 705; Kerr, pp. 12, 174).

How obtained.—An injunction was formerly obtained by writ.

Originally by Writ—Definition of Writ.—"A writ of injunction may be described to be a judicial process whereby a party was required to do a particular thing, or to refrain from doing a particular thing, according to the exigency of the writ. The most common form of a writ of injunction was that which operated as a restraint upon the party in the exercise of his real or supposed rights, and was sometimes called the remedial writ of injunction. The other form, commanding an act to be done, was sometimes called the

judicial writ, because it issued after a decree, and was in the nature of an execution to enforce the same; as, for instance, it might contain a direction to the party defendant to yield up, or to quiet, or to continue, the possession of the land or other property which constituted the subject-matter of the decree in favour of the other party. The object of this process, which was most extensively used in equity proceedings, was generally preventive and protective rather than restorative; although it was by no means confined to the former. It sought to prevent a meditated wrong more often than to redress an injury already done. It was not confined to cases falling within the exercise of the concurrent jurisdiction of the Court, but it equally applied to cases belonging to its exclusive and to its auxiliary jurisdiction" (Story's *Equity Jurisprudence*, p. 572).

Now by Judgment or Order.—In modern practice, however, the writ of injunction has no place, for by Order 50, r. 11 of the Rules of the Supreme Court, 1883, it is provided that no writ of injunction shall be issued; but that an injunction shall be by a judgment or order, and that any such judgment or order shall have the same effect which a writ of injunction previously had.

The several Kinds of Injunction.—Injunctions may be considered with regard to (1) the nature, and (2) the *quantum* of the relief afforded.

As regards the nature of relief injunctions are—

(*a*) Restrictive.

(*b*) Mandatory.

Viewed in relation to the amount of relief they are—

(*c*) Interlocutory.

(*d*) Perpetual.

Restrictive Injunctions.—The most ordinary form of injunction is that by which a wrong-doer is restrained from committing a tortious act in derogation of the rights of the plaintiff, as, *e.g.*, from committing waste, causing a nuisance (public or private), infringing a patent, or the like. Such an injunction may, for purposes of classification, be described as restrictive.

Mandatory Injunction.—A mandatory injunction is one which compels the defendant to perform an act, the effect of which is to restore matters to the position in which they stood before the injury of which the plaintiff complains was committed. The jurisdiction is of a delicate character, and is exercised by the Court with caution. In some of the earlier cases, indeed, it was said that extraordinary caution ought to be used in applying this remedy (see, *e.g.*, *Isenberg* v. *East India House Estate Co.*, 1863, 3 De G., J. & S. 263; *Durell* v. *Pritchard*, 1865, L. R. 1 Ch. 244); but in *Smith* v. *Smith*, 1875, L. R. 20 Eq. 500, Jessel, M. R., repudiated the idea that a larger amount of judicial caution was needed in granting orders of this nature than ought to be shown in granting any kind of injunction. "As to mandatory injunctions, their history is a curious one, and may account for some of the expressions used by the judges in some of the cases cited. At one time it was supposed that the Court would not issue mandatory injunctions at all. At a more recent period, in cases of nuisance, a mandatory injunction was granted under the form of restraining the defendant from committing the nuisance. The Court seems to have thought that there was some wonderful virtue in that form, and that extra caution was to be exercised in granting it. To that proposition I can by no means assent. Every injunction requires to be granted with care and caution, and I do not know what is meant by extraordinary caution. Every judge ought to exercise care, and it is not more needed in one case than in another" (p. 504).

Not usually granted until the Hearing.—An order for a mandatory

injunction will not, as a rule, be made except at the hearing, unless the defendant has endeavoured to anticipate the action of the Court by hurrying on the work complained of, pending litigation (*Beadel* v. *Perry*, 1866, L. R. 3 Eq. 465; *Daniel* v. *Ferguson*, [1891] 2 Ch. 27; *Von Joel* v. *Hornsey*, [1895] 2 Ch. 774; *Smith* v. *Day*, 1880, 13 Ch. D. 651); or after notice (*Morris* v. *Grant*, 1875, 24 W. R. 55); or unless it is shown that irreparable mischief will be done if the injury is allowed to continue until the hearing (*Westminster Brymbo Coal Co.* v. *Clayton*, 1867, 36 L. J. Ch. 476). There is, however, no doubt of the jurisdiction to grant a mandatory injunction on interlocutory application (*Bonner* v. *Great Western Rwy. Co.*, 1883, 24 Ch. D. p. 10; *Allport* v. *The Securities Co.*, 1895, 72 L. T. 533).

Delay or Acquiescence.—Unreasonable delay or acquiescence on the part of the plaintiff will deprive him of the right to a mandatory injunction (*Gaskin* v. *Balls*, 1879, 13 Ch. D. 324; *Senior* v. *Pawson*, 1866, L. R. 3 Eq. 330; *Gaunt* v. *Fynney*, 1872, L. R. 8 Ch. 8). But, where the Court is satisfied that a wrong has been wilfully done, and there has been no delay or acquiescence on the part of the plaintiff, an injunction will be granted as readily in a mandatory as in any other form (*Smith* v. *Smith*, 1875, L. R. 20 Eq. 500).

Damages.—In considering whether a mandatory injunction should be granted, the Court will have regard to the question whether or not the damage can be estimated and sufficiently compensated by a pecuniary payment (*Isenberg* v. *East India House Estate Co.*, 1863, 3 De G., J. & S. 363; *Durell* v. *Pritchard*, 1865, L. R. 1 Ch. 244; *City of London Brewery Co.* v. *Tennant*, 1873, L. R. 9 Ch. 212; and see, as to the principles on which the Court acts in awarding damages, *infra*, DAMAGES).

Balance of Convenience.—Another very material matter for consideration is the question of the comparative convenience or inconvenience of granting or withholding the injunction (*Lady Stanley* v. *Lord Shrewsbury*, 1875, L. R. 19 Eq. 616; *National Provincial Plate Glass Insurance Co.* v. *Prudential Assurance Co.*, 1876, 6 Ch. D. 769; *Goodson* v. *Richardson*, 1874, L. R. 9 Ch. 221; *Krehl* v. *Bassell*, 1878, 7 Ch. D. 551; 1879, 11 Ch. D. 146; *Macmanus* v. *Cooke*, 1887, 35 Ch. D. 681; Kerr, pp. 48–51).

Injunction after Injury complete.—It is no objection to granting a mandatory injunction that the injury complained of was complete before action brought, as, *e.g.*, the erection of a building obstructing the access of light (*Durell* v. *Pritchard*, 1865, L. R. 1 Ch. 244; *Kelk* v. *Pearson*, 1871, L. R. 6 Ch. 813; *Lawrence* v. *Horton*, 1890, 38 W. R. 555).

Interlocutory Injunctions. — Definition and Effect. — "Interlocutory injunctions are such as are to continue until the hearing of the cause upon the merits, or generally until further order. An interlocutory injunction is merely provisional in its nature, and does not conclude a right. The effect and object of the interlocutory injunction is merely to preserve the property in dispute *in statu quo* until the hearing or further order. In interfering by interlocutory injunction, the Court does not in general profess to anticipate the determination of the right, but merely gives it as its opinion that there is a substantial question to be tried, and that till the question is ripe for trial a case has been made out for the preservation of the property in the meantime *in statu quo*. A man who comes to the Court for an interlocutory injunction is not required to make out a case which will entitle him at all events to relief at the hearing. It is enough if he can show that he has a fair question to raise as to the existence of the right which he alleges, and can satisfy the Court that the property should be preserved in its present actual condition until such

question can be disposed of" (Kerr, pp. 9, 10; see *Preston* v. *Luck*, 1884, 27 Ch. D. 497).

Irreparable Injury.—Upon application for an interlocutory injunction regard will be had to the fact whether irreparable injury will be caused if the Court refuses to interfere (*A.-G.* v. *Sheffield Gas Consumers Co.*, 1853, 3 De G., M. & G. 304; and, as to what amounts to "irreparable injury," see Kerr, p. 14).

Conduct of Plaintiff.—The conduct of the party invoking the summary remedy will also be looked at. He must come to the Court with clean hands; and if he has acted with any want of faith, or in an unfair and inequitable manner, he will not be relieved (*Williams* v. *Roberts*, 1850, 8 Ha. 315; *Nicholson* v. *Hooper*, 1838, 4 Myl. & Cr. 179).

Acquiescence.—Acquiescence by the plaintiff in the injury complained of may be such as to disentitle him to summary relief (*Greenhalgh* v. *Manchester and Birmingham Rwy. Co.*, 1838, 3 Myl. & Cr. 784). The acquiescence indeed need not be of such a character as would be sufficient to bar the plaintiff's title to relief at the hearing (*Johnson* v. *Wyatt*, 1863, 2 De G., J. & S. 18; and see the judgment of Lord Langdale in *Gordon* v. *Cheltenham Rwy. Co.*, 1842, 5 Beav. 229. As to acquiescence, see Kerr, pp. 16–20. See, too, ACQUIESCENCE).

Delay.—So, too, the plaintiff may have been so dilatory in the assertion of his rights as to disentitle him to relief (*A.-G.* v. *Sheffield Gas Consumers Co.*, 1853, 3 De G., M. & G. 304). Where the summary interference of the Court is invoked, it must be invoked promptly. Parties who have lain by, and permitted a large expenditure to be made in contravention of the rights for which they contend, cannot call upon the Court for its summary interference (per Turner, L.J., *Great Western Rwy. Co.* v. *Oxford, Worcester, and Wolverhampton Rwy. Co.*, 1853, 3 De G., M. & G. p. 359).

Balance of Convenience.—The balance of convenience and inconvenience resulting from granting or refusing the order will also weigh with the Court. Thus in *Plimpton* v. *Spiller*, 1876, 4 Ch. D. 286 (an action to restrain the infringement of a patent), James, L.J., said: "There will always, no doubt, be the greatest possible difficulty in determining what is the best mode of keeping things *in statu quo*, for that is really what the Court has to do—to keep things *in statu quo* until the final decision of the question; and then, of course, the Court says, 'We will not stop a going trade. We will not adopt a course which will result in a very great difficulty in giving compensation on the one side or on the other'" (see, too, *Wood* v. *Sutcliffe*, 1851, 2 Sim. N. S. 163; *Mogul Steamship Co.* v. *M'Gregor*, 1885, 15 Q. B. D. 476; *Newson* v. *Pender*, 1884, 27 Ch. D. 43; *Mitchell* v. *Henry*, 1880, 15 Ch. D. 181; *Elwes* v. *Payne*, 1879, 12 Ch. D. 468).

The leading principle which ought, generally speaking, to be the guide of the Court, and to limit its discretion, at least where no very special circumstances occur, is, that only such a restraint should be imposed as may suffice to stop the mischief complained of; and where it is to stay further injury, to keep things as they were for the present (per Brougham, L.C., *Blakemore* v. *Glamorganshire Canal Navigation*, 1832, 1 Myl. & K. 154).

Libel Actions.—In libel actions an interlocutory injunction will only be granted under very extreme circumstances. It ought only to be granted in the clearest cases, in cases in which, if a jury did not find the matter complained of to be libellous, the Court would set the verdict aside as unreasonable (*Bonnard* v. *Perryman*, [1891] 2 Ch. 269). And this is an absolute rule of practice (so held by the majority of the Court in *Monson* v. *Tussaud*, [1894] 1 Q. B. 671).

Interim Order.—In cases of extreme urgency an interim order, which is granted on *ex parte* application, can be obtained. By this form of order the defendant is restrained over a day named therein (usually the next motion day) from continuing or committing the injury complained of, leave being given to serve notice of motion for a day named in the order (for form of Order, see Seton, p. 452).

Undertaking as to Damages.—The Court invariably insists as a term of granting an interlocutory injunction that the plaintiff shall give an undertaking to be answerable for any damages caused by the injunction, in case the Court shall award any. This subject is dealt with under the head of PRACTICE, *infra.*

Perpetual Injunctions.—"Perpetual injunctions are such as form part of the decree made at the hearing upon the merits, whereby the defendant is perpetually inhibited from the assertion of a right, or perpetually restrained from the commission of an act which would be contrary to equity and good conscience" (Kerr, p. 9).

One main object of a perpetual injunction is to prevent actions being multiplied indefinitely (*Imperial Gas Co.* v. *Broadbent*, 1859, 7 H. L. 600); otherwise a plaintiff might be harassed by being obliged over and over again to assert a right which has been already litigated. So injunctions are constantly made perpetual, for the purpose of preventing the continuance or repetition of acts for which the party defendant has no legal authority, as, for example, in cases of waste, infringements of patents, copyrights, or trade marks, and the like (Joyce, p. 1317; Daniell's *Ch. Pr.* p. 1620).

Right may be Forfeited.—Acquiescence or delay on the part of the plaintiff may be such as to forfeit his right to an injunction at the trial. With regard to acquiescence, however, it must be of a more prolonged character than would be sufficient to affect his title to an interlocutory injunction (*Johnson* v. *Wyatt*, 1863, 2 De G., J. & S. 18; and see, as to the equitable doctrine of acquiescence, *Wilmott* v. *Barber*, 1880, 15 Ch. D. 96; *Proctor* v. *Benniss*, 1887, 36 Ch. D. 740. The following cases may also be consulted: *Dann* v. *Spurrier*, 1802, 7 Ves. 230; 6 R. R. 119; *Williams* v. *Earl of Jersey*, 1841, Cr. & Ph. 91; *Rochdale Canal Co.* v. *Kay*, 1851, 2 Sim. N. S. 78; see also ACQUIESCENCE). As regards delay, it is established that mere lapse of time will not be a bar to the granting of an injunction in aid of a legal right, unless it would be a bar to the legal right (*Fullwood* v. *Fullwood*, 1878, 9 Ch. D. 176).

Only under very exceptional circumstances (see *infra*, DAMAGES) is there jurisdiction to compel a plaintiff to accept damages in lieu of an injunction, when he has established his right to the larger remedy (*Krehl* v. *Burrell*, 1878, 7 Ch. D. 551; *Shelfer* v. *City of London Electric Lighting Co.*, [1895] 1 Ch. 287).

(See further as to Perpetual Injunctions, Daniell's *Ch. Pr.* pp. 1620–1622; Joyce, pp. 1314–1319; Kerr, pp. 42–48; Seton, p. 630.)

III. DAMAGES.

Cairns' Act.—Originally the Court of Chancery had no jurisdiction to award damages. The power to do so was conferred by the Chancery Amendment Act, 1858, more commonly known, from the name of its author, as Lord Cairns' Act (21 & 22 Vict. c. 27). Sec. 2 of the Act was in the following terms:—

> In all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract, or agreement, or against the commission or continuance of any wrongful act, or for the

> specific performance of any covenant, contract, or agreement, it shall be lawful for the same Court, if it shall think fit, to award damages to the party injured, either in addition to or in substitution for such injunction or specific performance, and such damages may be assessed in such manner as the Court shall direct.

The section has been repealed by the Statute Law Revision and Civil Procedure Act, 1883 (46 & 47 Vict. c. 49, s. 3); but the repeal has not affected the jurisdiction of the Court, which is retained by sec. 2 (*Sayers* v. *Collyer*, 1884, 28 Ch. D. 103).

Independently, however, of Lord Cairns' Act, the High Court of Justice can, under the Judicature Act, award either an injunction or damages. The nature of the jurisdiction and the effect of the repeal were thus stated by Lord Esher, M. R.: "In cases where a suit for an injunction lay in Chancery, damages would be recoverable at common law, and in many cases the Court of Chancery would not grant an injunction till the right to damages had first been established by an action at law. Lord Cairns' Act was passed to meet this difficulty, and was one of the enactments which have from time to time been passed to prevent the necessity for double proceedings. It was intended to obviate the necessity for going to a common law Court for damages and then to the Court of Chancery for an injunction, and to enable the Court of Chancery itself to determine the right to damages, and then give an injunction. But the Act went further than that, and gave the Court of Chancery power to give damages in substitution for an injunction. . . . . It is true that Lord Cairns' Act has been repealed by 46 & 47 Vict. c. 49, but I am confident that the repeal was not with the intent of taking away any of the powers given by the Act in a Chancery action, but because it was considered that the Judicature Acts re-enacted those powers, and therefore that Lord Cairns' Act had become obsolete and might be repealed" (*Chapman* v. *Guardians of Auckland Union*, 1889, 23 Q. B. D. pp. 297–299; and see, per Baggallay, L.J., *Sayers* v. *Collyer*, 1884, 28 Ch. D. p. 108; *Serrao* v. *Noel*, 1885, 15 Q. B. D. p. 559).

Discretion, how exercised.—The discretion vested in the Court is a judicial discretion, to be exercised according to something like a settled rule (*Smith* v. *Smith*, 1875, L. R. 20 Eq. 500). It is a reasonable discretion to be reasonably exercised (per Jessel, M. R., *Aynsley* v. *Glover*, 1874, L. R. 18 Eq. p. 555); and according to the facts of the particular case (*Greenwood* v. *Hornsey*, 1886, 33 Ch. D. 471). It is, moreover, an exceptional discretion, to be exercised only in exceptional cases (*Shelfer* v. *City of London Electric Lighting Co.*, [1895] 1 Ch. 287). The Legislature did not intend to turn the Court into a tribunal for legalising wrongful acts. The Court has always protested against the notion that it ought to allow a wrong to continue simply because the wrong-doer is able and willing to pay for the injury he may inflict (*Shelfer* v. *City of London Electric Lighting Co.* (*ubi supra*), pp. 314, 315). It never was intended to invest the Court with a power to compel people to sell their property without their consent at a valuation (per Jessel, M. R., *Krehl* v. *Burrell*, 1877, 7 Ch. D. p. 554).

In *Shelfer* v. *City of London Electric Lighting Co.* (*ubi supra*), A. L. Smith, L.J., stated, as a good working rule, that (1) if the injury to the plaintiff's legal rights is small; (2) and one which is capable of being estimated in money; (3) and one which can be adequately compensated by a small money payment; (4) and one in which it would be oppressive to the defendant to grant an injunction—damages in substitution for an injunction may be given. There may, however, be cases in which, although these four

requirements exist, the defendant has disentitled himself from asking that damages should be assessed in lieu of an injunction.

Damages are no adequate substitute for an injunction unless they cover the whole field which would have been covered by the injunction (per Fry, J., *Fritz* v. *Hobson*, 1880, 14 Ch. D. p. 557).

Where there is no case for an injunction, damages cannot be given (*Proctor* v. *Bayley*, 1890, 42 Ch. D. p. 401).

In the case of a mere threatened injury, it was held, in *Dreyfus* v. *Peruvian Guano Co.*, 1889, 43 Ch. D. 316, that there is no power to award damages; but see *Martin* v. *Price*, [1894] 1 Ch. 276, where the question as to the jurisdiction to award damages in lieu of an injunction in such a case was left in doubt.

Acquiescence.—Acquiescence by the plaintiff may be of such a character as to induce the Court to act under Lord Cairns' Act, even though the acquiescence be not sufficient to bar the action (*Sayers* v. *Collyer*, 1884, 28 Ch. D. p. 110).

Nominal Damages.—In *Sayers* v. *Collyer* (*ubi supra*) the judge at the trial, considering the injury to the plaintiff was very slight, awarded damages in lieu of an injunction, and, assessing such damages at a nominal sum, dismissed the action. On appeal it was seriously contended that the Act did not apply to a case of merely nominal damages. The Court, however, had no difficulty in brushing aside this argument as a mere *reductio ad absurdum*. "The Act applies with double force to cases where only nominal damages could be given, otherwise this absurd result would follow, that if a plaintiff is entitled to substantial damages, the Court would refuse him an injunction; but if he had no real cause of complaint, he would have a right to an injunction. In other words, as his damages descended to zero, his right to an injunction would correspondingly increase" (per Bowen, L.J., p. 109).

Result of Cases.—The net result of the cases would seem to be this. Where a plaintiff has established his right to an injunction, and has done nothing to forfeit such right, and the injury is proved to be serious, the Court will not, and cannot, consistently with the principles on which it exercises the discretion reposed in it, refuse an injunction. Under exceptional circumstances, however, arising from (*a*) the conduct of the plaintiff, or (*b*) the *quantum* of injury, the Court can and will award the alternative remedy of damages. Whether under any circumstances there is jurisdiction to give damages instead of an injunction in the case of apprehended injury is a point still doubtful. (See also CAIRNS' ACT.)

Damages, how ascertained.—Where damages are awarded, they may be assessed by the judge at the trial (*Holland* v. *Worley*, 1884, 26 Ch. D. 578). In other cases an inquiry as to damages will be directed, which will be worked out in chambers.

Undertaking as to Damages.—The question of the undertaking as to damages, which is invariably required as a condition of granting an interlocutory injunction, is dealt with under the head of PRACTICE, *infra*.

IV. PRACTICE.

This slight sketch of a very large subject would be incomplete if no mention were made of the practice of the Court with regard to injunctions. This section therefore will be devoted to a short outline of that part of the subject.

Indorsement on Writ.—Under the old practice of the Court of Chancery it was only under very exceptional circumstances that an injunction was

granted before decree unless prayed for by the bill. Under the present practice, if an injunction is a substantial object of the action, it is usual, though not necessary, that it should be claimed by the indorsement on the writ (*Colebourne* v. *Colebourne*, 1876, 1 Ch. D. 690).

After judgment, whenever it is shown to be just or convenient, an injunction may be granted, even though it was not claimed by the writ (*Anglo-Italian Bank* v. *Davies*, 1878, 9 Ch. D. 286).

Application, by whom made.—An application for an injunction may be made by any party (Order 50, r. 6). A defendant may in a proper case apply, and that notwithstanding the plaintiff has served a notice of motion for the like purpose (*Saryant* v. *Read*, 1876, 1 Ch. D. 600). But, unless the defendant has delivered a counterclaim, he cannot apply for an injunction against the plaintiff, unless the relief sought by such injunction is incident to or arises out of the relief sought by the plaintiff. If he desires any other relief before the time for delivery of a counterclaim, he must issue a writ in a cross-action (*Carter* v. *Fey*, [1894] 2 Ch. 541).

When Application made.—The plaintiff may apply at any time after writ issued. In a case decided before the Judicature Act an application was entertained even before bill filed (*Thornelow* v. *Skoines*, 1873, L. R. 16 Eq. 126); but this case must be considered as of very doubtful authority, and, *semble*, would not now be followed (see *Annual Practice*, 1898, p. 890). A defendant cannot apply until after appearance, and then only on notice (Order 50, r. 6).

Ex parte Applications.—In very urgent cases an order can be obtained *ex parte*, so soon as the writ has been issued. The usual course in such cases is for the Court to make an interim order extending over a day named therein, and to give leave to serve notice of motion for a particular day, together with a copy of the writ. Ordinarily there must be at least two clear days between the service of a notice of motion and the date named in the notice for hearing the motion (Order 52, r. 4); but leave to serve short notice of motion can be obtained. Such leave must be granted by a judge in person, and cannot be given by a master in chambers (*Conacher* v. *Conacher*, 1881, 29 W. R. 230). The fact that leave to serve *short* notice is applied for must be distinctly stated to the Court, and the fact that leave to serve short notice has been granted must appear on the face of the notice itself (*Dawson* v. *Beeson*, 1882, 22 Ch. D. 504).

After the defendant has appeared it is unusual to grant an injunction *ex parte*, though in urgent cases notice to the defendant may be dispensed with (*Harrison* v. *Cockerell*, 1817, 3 Mer. 1; *Petley* v. *Eastern Counties Rwy. Co.*, 1839, 8 Sim. 483; *Langham* v. *Great Northern Rwy. Co.*, 1848, 1 De G. & Sm. 486). The fact of appearance should be communicated to the Court (*Mexican Co.* v. *London and Maldonado*, 1890, W. N. 8; *Harrison* v. *Cockerell* (*ubi supra*)).

After notice of motion has once been served it is improper to apply *ex parte* (*Graham* v. *Campbell*, 1878, 7 Ch. D. 490).

Upon *ex parte* applications the utmost good faith must be observed. For, if there has been any suppression of material facts, that in itself would be good ground for dissolving the injunction quite apart from merits (*Brown* v. *Newall*, 1837, 2 Myl. & Cr. 558; *A.-G.* v. *Corporation of Liverpool*, 1835, 1 Myl. & Cr. 171; *Dalglish* v. *Jarvie*, 1850, 2 Mac. & G. 231; *Clifton* v. *Robinson*, 1853, 16 Beav. 335; *Wimbledon Local Board* v. *Croydon Sanitary Authority*, 1886, 32 Ch. D. 421; *Boyce* v. *Gill*, 1891, 64 L. T. 824). "The Court can have no ground upon which it can proceed, in granting an *ex parte* injunction, but a faithful statement of the case; and where the Court has

found a party misstating the case, either by misrepresentation or suppression, the Court has always exercised its jurisdiction for the purpose of repressing that practice" (per Lord Cottenham, L.C., *Brown* v. *Newall*, 1837, 2 Myl. & Cr. p. 571). "The jurisdiction of the Court in granting *ex parte* injunctions is a very hazardous one, and one which, though often used to preserve property, may be often used to the injury of others; and it is right that a strict hand should be held over those who come with such applications" (*A.-G.* v. *Corporation of Liverpool*, 1835, 1 Myl. & Cr. p. 211). "The party applying is bound to put the Court in possession of all the facts, in order to enable it to judge whether the defendant ought to be put to what may be occasionally a very serious evil, namely, a temporary injunction. The Court does not deal with the same strictness and severity in the case of an injunction obtained on notice, and very properly so, for then the opposite party has the opportunity of bringing forward every circumstance favourable to his case" (*Maclaren* v. *Stainton*, 1852, 16 Beav. p. 290).

Notice of Motion.—The plaintiff can, without special leave, serve notice of motion upon a defendant who has appeared (Order 52, r. 8); and, by leave, with the writ, or at any time after service of the writ and before the time limited for appearance (Order 52, r. 9). A notice of motion should state clearly the nature of the order asked for (*Brown* v. *Robertson*, 1846, 2 Ph. 173).

Evidence.—The motion is usually heard on affidavit evidence on both sides. If necessary, the witnesses can be orally examined, and cross-examined on their affidavits.

In the case of an *ex parte* application for an injunction, the party making the application must furnish copies of the affidavits upon which it is granted, upon payment of the proper charges, immediately upon the receipt of a written request for the same, with an undertaking to pay the proper charges, or within such time as is specified in such request or may have been directed by the Court or a judge (Order 66, r. 7 (*j*)). (As to evidence, see further Daniell's *Ch. Pr.* pp. 1612–1614; Kerr, pp. 617–622.)

Hearing of Motion.—Upon the hearing of the motion the Court will either grant or refuse the order, or will, if it should be of opinion that no case is made for an interlocutory injunction, but that there is a case to be tried at the hearing of the action, order the motion to stand over until the trial. An undertaking is often accepted in lieu of an actual order.

Form of Order.—An order for an interlocutory injunction enjoins the party against whom it is made "until judgment in the action or further order."

Undertaking as to Damages.—On granting interlocutory injunctions, whether obtained *ex parte* or on notice, it is the invariable practice of the Court to require an undertaking from the plaintiff to be answerable for damages caused to the defendant by the injunction, in the event of the Court hereafter awarding any such damages (*Graham* v. *Campbell*, 1878, 7 Ch. D. 490). But where an injunction, though interlocutory in the sense of being granted between the issue of the writ and the hearing of the action, is really final, the undertaking will not be required. Thus where in an action to restrain the infringement of a patent, an order was made on the application of the defendant restraining the plaintiffs until judgment from publishing threats of legal proceedings for infringement, it was held that the undertaking ought not to be inserted in the order (*Fenner* v. *Wilson*, [1893] 2 Ch. 656). There is no power to compel a plaintiff to give the undertaking. It is a term imposed by the Court, which the

plaintiff may refuse to accept (*Tucker* v. *New Brunswick Trading Co. of London*, 1890, 44 Ch. D. 249).

As to the history of the undertaking the judgment of Jessel, M. R., in *Smith* v. *Day*, 1882, 21 Ch. D. 451, may be consulted.

From whom required.—The undertaking will not be required from the Crown suing by the Attorney-General (*A.-G.* v. *Albany Hotel Co.*, [1896] 2 Ch. 696).

The undertaking of a married woman is sufficient (*In re Prynne*, 1885, 53 L. T. 465).

Where a corporation or joint-stock company was plaintiff it was not formerly the practice to accept merely the undertaking of counsel on behalf of the plaintiffs, but a director or other responsible person was required to sign the Registrar's book. Under the present practice, however, it seems that the undertaking of a corporation will be accepted. Thus the undertaking of a local board was held to be sufficient (*East Molesey Local Board* v. *Lambeth Waterworks Co.*, [1892] 3 Ch. 289); and of a limited company (*Manchester and Liverpool District Banking Co.* v. *Parkinson*, 1889, 60 L. T. 47).

Where the plaintiff is resident out of the jurisdiction, an undertaking may be required from his agent or some responsible person (*Hamilton* v. *Board*, 1863, 1 N. R. 379; Seton, p. 456).

Extent of Undertaking.—The undertaking is not confined to damages sustained by the party against whom the injunction is granted, but extends to all the defendants who ask for it (*Tucker* v. *New Brunswick Trading Co. of London*, 1890, 44 Ch. D. 249).

Effect to be given to the Undertaking.—Effect ought to be given to the undertaking, except under very special circumstances (*Graham* v. *Campbell*, 1878, 7 Ch. D. 494). There is, however, a discretion in the Court; and unexplained and unreasonable delay in making an application to enforce it (*Ex parte Hall, In re Wood*, 1883, 23 Ch. D. 644), or trivial and remote damage (*Smith* v. *Day*, 1882, 21 Ch. D. 421), have been held sufficient reasons to disentitle the defendant to the benefit of it.

In *Smith* v. *Day* (*ubi supra*) Jessel, M. R., expressed the opinion that a defendant is not entitled to have the undertaking enforced, where an interlocutory injunction has been wrongly granted owing to a mistake of law by the judge without any misrepresentation, suppression, or default on the part of the plaintiff; but this *dictum* was dissented from by the Court of Appeal in *Griffith* v. *Blake*, 1884, 27 Ch. D. 474; and the rule is now clear that, whenever the undertaking is given, and the plaintiff ultimately fails on the merits, an inquiry as to damages will be directed, unless there are special circumstances to the contrary. And the undertaking is equally enforceable where there has been a mistake of law on the part of the Court (*Hunt* v. *Hunt*, 1885, 54 L. J. Ch. 289).

Where the Court can satisfy itself of the amount of damage caused to the defendant by the injunction an inquiry will not be directed, but the Court will at once assess the damages, and save expense to the parties (*Graham* v. *Campbell*, 1878, 7 Ch. D. 494).

Neither discontinuance of the action (*Newcomon* v. *Coulson*, 1878, 7 Ch. D. 764), nor its dismissal (*Newby* v. *Harrison*, 1861, 3 De G., F. & J. 287), nor the discharge of the order containing the undertaking (*Ross* v. *Buxton*, 1888, W. N. 55), have the effect of superseding the undertaking; and it has been enforced in favour of the real and personal representatives of a deceased defendant (*Sheppard* v. *Gilmore*, 1887, W. N. 242).

Service of Order for Injunction.—An order for an injunction should be

completed with all possible despatch. But notice of the order having been made is in the first instance sufficient, or a copy of the minutes may be obtained from the Registrar and served on the party enjoined (*Heywood* v. *Wait*, 1870, 18 W. R. 205). Notice by telegram has been held to be sufficient (*In re Bryant*, 1876, 4 Ch. D. 98; *Ex parte Langley, Ex parte Smith, In re Bishop*, 1879, 13 Ch. D. 110; *The Seraglio*, 1885, 10 P. D. 120). It is, however, desirable that the order should be drawn up, passed, and entered with as little delay as the circumstances admit of. When completed it should be served on the defendant. Service must, unless substituted service is authorised, be personal, and, if the order be mandatory, it must bear the indorsement prescribed by Order 41, r. 5. Such indorsement is not necessary in the case of an order which is merely prohibitive (*Selous* v. *Croydon Rural Sanitary Authority*, 1885, 53 L. T. 209).

Dissolving Injunction.—An interlocutory injunction may be dissolved at any time before trial (see *dictum* of Jessel, M. R., in *In re Holt*, 1880, 16 Ch. D. 115).

An injunction is *ipso facto* dissolved by dismissal of the action (*Green* v. *Pulsford*, 1839, 2 Beav. 7). Where an injunction is granted on the merits it is not lost by subsequent amendment of the writ (*Harvey* v. *Hall*, 1870, L. R. 11 Eq. 31).

How Application made.—An application to dissolve an injunction is made by motion on notice. In urgent cases leave to serve short notice of motion can be obtained. It will be heard on evidence filed by the defendant in opposition to the affidavits on which the order for injunction was made. The Court has refused to allow the motion to stand over to enable the plaintiff to cross-examine the defendant's witnesses (*Normanville* v. *Stenning*, 1853, 10 Ha. App. xx.).

Where Order obtained improperly.—Where it appears that an injunction has been obtained *ex parte* on the suppression of material facts, the order will be at once discharged, without regard to merits (see cases cited *supra* under the head of *Ex parte Injunctions*). And so, where the order was made on the terms of adding a person as plaintiff who could give an undertaking in damages, and several days were allowed to elapse without making the necessary amendment, the Court at once dissolved the injunction, on the ground that good faith had not been kept (*Spanish General Agency Corporation* v. *Spanish Corporation*, 1890, 63 L. T. 161).

Where on motion for injunction or to continue an interim order already obtained it appeared that there had been suppression of material facts on the original application, the Court dissolved the *ex parte* order with costs without a cross-notice of motion by the defendant (*Boyce* v. *Gill*, 1891, 64 L. T. 824). In such case, however, the injunction asked for may be granted on evidence (S. C.; and see *Fitch* v. *Rochfort*, 1849, 18 L. J. Ch. 458).

It is not, however, necessary for a plaintiff to state every fact to the Court on applying for an *ex parte* order. He is under no obligation to state facts not relevant to any real issue between the parties (*Weston* v. *Arnold*, 1873, L. R. 8 Ch. 1084).

A motion to discharge an *ex parte* injunction on the ground that it has been obtained by misrepresentation is proper, though the injunction is about to expire (*Wimbledon Local Board* v. *Croydon Rural Sanitary Authority*, 1886, 32 Ch. D. 421).

Where Injunction granted over a certain Day.—Where an injunction is granted over a day named or until further order, it signifies that the injunction may be dissolved before the day fixed, but cannot be extended

beyond that period except with leave of the Court (*Bolton* v. *London School Board*, 1878, 7 Ch. D. 766).

Acquiescence and Delay.—A defendant may lose his right to have an injunction dissolved by acquiescing in it, or by long delay in applying to discharge it (*Glascott* v. *Lang*, 1838, 3 Myl. & Cr. 451; *Bickford* v. *Skewes*, 1839, 4 Myl. & Cr. 498; *Bell* v. *Hull and Selby Ruy. Co.*, 1839, 1 Rail. C. 616), and a party who has deliberately consented to a perpetual injunction will not be allowed to withdraw such consent merely because he has discovered that he might have a good defence to the action (*Elsas* v. *Williams*, 1884, 54 L. J. Ch. 336).

See further, as to dissolving injunctions, Daniell's *Ch. Pr.* pp. 1617–1620; Joyce, pp. 1264–1280; Kerr, pp. 631–636; Seton, pp. 628, 629.

Continuing Injunctions.—An injunction obtained upon an interlocutory application is superseded by the judgment at the trial. If it is desired that it should still remain in force, it must be expressly continued. It may be continued provisionally, pending inquiries or accounts necessary for working out the rights of the parties, or permanently, in which case it takes the form of a perpetual injunction (see Daniell's *Ch. Pr.* p. 1620).

Perpetual Injunctions, when granted.—Perpetual injunctions are not, as a rule, granted except at the hearing, unless the parties agree to treat the hearing of a motion for an interlocutory order as the hearing of the action (*Morrell* v. *Pearson*, 1849, 12 Beav. 284). In modern practice it is by no means uncommon to obtain by consent an order for a perpetual injunction upon summons. And, where the defendant by his defence (*London Steam Dyeing Co.* v. *Digby*, 1888, 36 W. R. 497), or by letter (*Allen* v. *Oakey*, 1890, 62 L. T. 724), offered to consent to an order being made in chambers, the plaintiff was not allowed the extra costs occasioned by his insisting on the case being disposed of in Court.

A perpetual injunction can be obtained at the hearing, though the plaintiff has not previously applied for an interlocutory order (*Bacon* v. *Jones*, 1839, 4 Myl. & Cr. 433).

Suspending Injunction.—Where a plaintiff has proved his right to an injunction against a nuisance or other injury, it is no part of the duty of the Court to inquire in what way the defendant can best remove it. The plaintiff is entitled to an injunction at once, unless the removal of the injury is physically impossible; it is the duty of the defendant to find his own way out of the difficulty, whatever inconvenience or expense it may put him to (*A.-G.* v. *Colney Hatch Lunatic Asylum*, 1869, L. R. 4 Ch. 146). But, where the difficulty of removing the injury is great, the Court will suspend the operation of the injunction for a time, so as to afford an opportunity to the defendant of complying with the order (S. C.; *Goldsmid* v. *Tunbridge Wells Commissioners*, 1865, L. R. 1 Eq. 161: 1 Ch. 349; *A.-G.* v. *Proprietors of Bradford Canal*, 1866, L. R. 2 Eq. 71; *A.-G.* v. *Leeds Corporation*, 1870, L. R. 5 Ch. 583).

Where the Court of Appeal has granted an injunction, an application to suspend it may be made to the judge in the Court below (*Shelfer* v. *City of London Electric Lighting Co.*, [1895] 2 Ch. 388).

Death of Plaintiff—Survival of Cause of Action.—Where a plaintiff, who had brought an action for a mandatory injunction and damages for obstruction of light, died more than six months after the commencement of action, and her executor and devisee obtained an order to carry on proceedings against the defendant, it was held that the plaintiff's equitable right to a mandatory injunction devolved on her devisee, and that he, in his capacity of executor, was at least entitled to continue the action for recovery of

damages in respect of injury committed during a period of six months prior to the plaintiff's death (*Jones* v. *Simes*, 1890, 43 Ch. D. 607).

Costs—of Motions.—As a rule, the costs of motions for injunctions are made costs in the action, so that the party who is ultimately successful in the litigation gets such costs. "The course of the Court provides for the costs of motions for injunctions in a way most just, by leaving the party moving, if his suit fails, to pay the costs; and if his suit succeeds, providing for his costs effectually (*Great Western Rwy. Co.* v. *Oxford, Worcester, and Wolverhampton Rwy. Co.*, 1852, 5 De G. & Sm. 437).

As to the general rules with regard to costs on motions, where there is no direction in the order, laid down by Sir John Leach (1823, 1 S. & S. 357), see Morgan and Wurtzburg on *Costs*, p. 47; Kerr, p. 31; Seton, p. 346.

Where a motion is ordered to stand over to the trial, and is not then brought on, and the action is subsequently dismissed with costs, the defendant's costs of the motion will be included in the costs to be taxed without any express direction to that effect (*Gosnell* v. *Bishop*, 1888, 38 Ch. D. 385).

The following rule as to costs of interlocutory applications has recently been laid down by the judges of the Chancery Division: Where interlocutory applications have been ordered to stand to the trial, and are not then mentioned to the judge, the costs of such applications are to be treated as costs in the action, and taxed accordingly, and need not be mentioned in the judgment. Where such applications have been disposed of, but the costs have been reserved, such costs are not to be mentioned in the judgment or order, or allowed on taxation, without the special direction of the judge (*British Natural Premium Provident Association* v. *Bywater*, [1897] 2 Ch. 531).

Where the object of the action is attained on motion, the plaintiff ought to apply to the defendant to have the costs disposed of on motion, otherwise he will not be allowed the extra costs of bringing on the action to trial (*Sonnenschein* v. *Barnard*, 1888, 57 L. T. 712).

Costs generally.—Where a plaintiff comes to enforce a legal right, and there has been no misconduct on his part, no omission or neglect which would induce the Court to deprive him of his costs, the Court has no discretion, and cannot take away the plaintiff's right to costs. To entitle him to costs, the plaintiff is not bound to give notice before commencing proceedings (*Cooper* v. *Whittingham*, 1880, 15 Ch. D. 501; *Goodhart* v. *Hyett*, 1883, 25 Ch. D. 182). Thus innocent infringers of trade marks or registered designs have been ordered to pay costs (*Upmann* v. *Forester*, 1883, 24 Ch. D. 231; *Wittman* v. *Oppenheim*, 1884, 27 Ch. D. 260). But where there had been an innocent dealing with a small quantity of goods which turned out to be an infringement of the plaintiff's trade mark, and defendant submitted to an injunction, the Court refused to order him to pay costs (*American Tobacco Co.* v. *Guest*, [1892] 1 Ch. 630). And where, in an action for infringement of copyright, the defendants offered an undertaking with costs not to republish the matter complained of, and the plaintiffs nevertheless proceeded with their action, they were disallowed their costs subsequent to the defendants' offer (*Walter* v. *Steinkopff*, [1892] 3 Ch. 489; and see *Jenkins* v. *Hope*, [1896] 1 Ch. 278).

Breach of Injunction.—A party who has notice of an order of the Court is bound by it from the time the order is pronounced (*M'Neil* v. *Garratt*, 1841, Cr. & Ph. 98). As long as an injunction exists it must be obeyed. Those who wish to get rid of an order must do so in the proper way, that is

by appeal. So long as it exists it must be obeyed, and obeyed to the letter, and anyone who does not obey it to the letter is guilty of committing a wilful breach of it, unless there be some misapprehension, which may mislead him upon the plain reading of the order (*Spokes* v. *Banbury Local Board of Health*, 1865, L. R. 1 Eq. 42). It is not open to any party to question an order of the Court or any process under the authority of the Court by disobedience. If the order be irregular, the party affected by it must take the proper steps to set it aside (*Russell* v. *East Anglian Rwy. Co.*, 1850, 3 Mac. & G. 104).

An undertaking given to the Court is equivalent to an injunction, and, if violated, may be the subject of an application to the Court (*London and Birmingham Rwy. Co.* v. *Grand Junction Canal Co.*, 1835, 1 Rail. C. 224). But where a defendant by mistake consented to an undertaking more extensive than he intended, the Court refused to enforce that part of the undertaking which had been given by mistake (*Mullins* v. *Howell*, 1879, 11 Ch. D. 763).

Remedy for Breach.—By Order 42, r. 7, it is provided that a judgment requiring any person to do any act other than the payment of money, or to abstain from doing anything, may be enforced by writ of attachment, or by committal. (See EXECUTION.) But, notwithstanding the above rule, committal, rather than attachment, appears to be the more appropriate remedy in the case of breach of an injunction.

Notice of Injunction.—Before the Court will assert its authority to punish a breach of an injunction, it will require to be satisfied that the party was aware of the fact that the order for an injunction had been made. Strictly speaking, the order ought to be served on the party enjoined, but, as has already been stated, such service is not essential. If once it is established that the party against whom the application is made was aware of or has notice of the injunction, the Court will not allow him to disregard its order with impunity. It matters not how the notice was given (*Heywood* v. *Wait*, 1870, 18 W. R. 205). Thus, where a man was in Court and had notice of the order by being present when it was pronounced, he was adjudged guilty of contempt by acting in breach of it, even though he had not been served with the order (*Skip* v. *Harwood*, 1747, 3 Atk. 564; and see *Hearn* v. *Tennant*, 1807, 14 Ves. 136; 9 R. R. 253; *Kimpton* v. *Eve*, 1813, 2 Ves. & Bea. 349; 13 R. R. 116; *Vansandau* v. *Rose*, 1820, 2 Jac. & W. 261; 22 R. R. 114; *M'Neil* v. *Garratt*, 1841, Cr. & Ph. 98). The rule is not limited to cases in which a breach is committed before there has been time for the plaintiff to get the order drawn up and entered (*United Telephone Co.* v. *Dale*, 1884, 25 Ch. D. 778). Even if the party is not named in the order, yet if he is proved to have notice of it, he will be held to be in contempt. So where trustees of a friendly society were restrained by name from dividing a sum of money among the members, and the old trustees having retired, new trustees were appointed in their place, who proceeded to divide the money, the new as well as the old trustees were held to be guilty of contempt. People cannot by a *ruse* avoid and get rid of an order made by the Court (*Avory* v. *Andrews*, 1882, 30 W. R. 564).

Where, however, it is sought to commit for contempt a person who after receiving a notice disregards it, the Court must decide upon the particular facts of the case whether he had in fact notice of the injunction, and it is the duty of those who ask for the committal to prove this beyond reasonable doubt (*Ex parte Langley*, *Ex parte Smith*, *In re Bishop*, 1879, 13 Ch. D. 110). A person who has violated an injunction will not be committed when he swears that, though he had received notice of it by telegram, he *bonâ fide*

believed that no injunction had been granted, and the circumstances show that such a belief was not unreasonable (*Ex parte Langley, ubi supra*; and see *Kimpton* v. *Eve*, 1813, 2 Ves. & Bea. 349; 13 R. R. 116).

Person not a Party.—A person, not himself included in the injunction nor a party to the action, who knowingly aids and abets the defendant in a breach may be committed (*Seaward* v. *Paterson*, [1897] 1 Ch. 545; and see *Lewis* v. *Morgan*, 1818, 5 Price, 518; *Lord Wellesley* v. *Earl Mornington*, 1848, 11 Beav. 180).

Motion to Commit.—An application to commit is made by motion, which must be personally served (*Angerstein* v. *Hunt*, 1801, 6 Ves. 488; *Hope* v. *Carnegie*, 1868, L. R. 7 Eq. 254; *Mander* v. *Falcke*, [1891] 3 Ch. 488). The notice of motion must state in general terms the grounds of the application; and where it is founded on evidence by affidavit, a copy of any affidavit intended to be used must be served with the notice of motion (Order 52, r. 4).

Costs.—Unless in extreme cases an actual order for committal is not usually made, the Court being satisfied to make the party in contempt pay the costs (see *Price* v. *Hutchison*, 1869, L. R. 9 Eq. 536).

Appeal.—An appeal lies from an order of the Court adjudicating a person guilty of contempt by committing a breach of an injunction and ordering him to pay the costs, for such an appeal is not one for costs only within sec. 49 of the Judicature Act, 1873 (*Witt* v. *Corcoran*, 1876, 2 Ch. D. 69); and from an order refusing to commit for contempt (*Jarmain* v. *Chatterton*, 1882, 20 Ch. D. 493).

Sequestration.—In the case of persons who are privileged from arrest sequestration is the appropriate remedy for breach of an injunction; and so also in the case of a corporation (Order 42, r. 31; see *Spokes* v. *Banbury Local Board of Health*, 1865, L. R. 1 Eq. 42).

Substitutionary Execution.—If a mandatory order or injunction be not complied with, the Court or a judge, besides or instead of proceedings against the disobedient party for contempt, may direct that the act required to be done may be done so far as practicable by the party by whom the order has been obtained, or some other person appointed by the Court or judge, at the cost of the disobedient party, and upon the act being done, the expenses incurred may be ascertained in such manner as the Court or a judge may direct, and execution may issue for the amount ascertained, and costs (Order 42, r. 30).

(See further as to Breach of Injunctions, Daniell's *Ch. Pr.* pp. 1622–1627; Joyce, pp. 1321–1339; Kerr, pp. 640–649; Seton, pp. 632–634).

[See also such articles as ACQUIESCENCE; AIR; ANCIENT LIGHTS; CAIRNS' ACT; CONTEMPT OF COURT; COPYRIGHT; COVENANTS IN LEASES; DAMAGES; EASEMENT; EXECUTION; LIGHT; MINES AND MINERALS; NUISANCE; PATENTS; RESTRAINT OF TRADE; SUPPORT; TRADE LABEL; TRADE MARK; TRADE NAME; TRESPASS; WASTE; WATER; WAY.]

[*Authorities.*—Addison's *Treatise on the Law of Contracts*, 9th ed., 1892, pp. 281–287; *The Annual Practice*, 1898; Chitty's *Archbold's Practice*, 14th ed., 1885, pp. 426–431; Daniell's *Chancery Practice*, 6th ed., 1884, pp. 1574–1627; Day's *Common Law Procedure Acts*, 4th ed., 1872; Eden on *Injunctions*, 1821; Fry on *Specific Performance of Contracts*, 3rd ed., 1892, pp. 522–528; Gilbert's *Forum Romanum*, 1758; Joyce on *Injunctions*, 1872; Kerr on *Injunctions*, 3rd ed., 1888; Pollock on *Torts*, 5th ed., 1897; Seton's *Judgments and Orders*, 5th ed., 1891, pp. 452–634; Spence on *The Equitable Jurisdiction of the Court of Chancery*, 1846; Story's *Commentaries on Equity Jurisprudence*, 2nd English ed., 1892, pp. 570–624.]

Injunctions of Edward VI. and Elizabeth.—*Injunctions of Edward the Sixth.*—The injunctions of Edward VI. (for which see Cardwell, *Documentary Annals of the Church of England*, p. 4) were issued in the year 1547 by the king, who was a minor, by the advice of the Duke of Somerset, Lord Protector of the realm. Their object was to accelerate the Reformation, which was then in progress, by removing from the churches ornaments relating to superstition and idolatry.

The legal force of these injunctions at the present time has been questioned on the twofold ground that they were not lawfully issued under statutable authority, and that if they were thus issued they have since been repealed.

In *Westerton* v. *Liddell*, 1855–57 (Moo. Special Report), Dr. Lushington, judge of the London Consistory Court, held that the burden of proof was on those who asserted their legal authority, and that it had not been established. Sir John Dodson, Dean of Arches, on appeal, held that they had legal authority under the Proclamation Acts, 31 Hen. VIII. c. 8, and 34 & 35 Hen. VIII. c. 23. Sir R. Phillimore, Dean of Arches, in *Martin* v. *Mackonochie*, 1868, L. R. 2 Ad. & Ec. 116, took the same view of their legality, and also considered that on certain technical grounds they were not valid under the Proclamation Act, that they would still be valid under the Supremacy Act, 26 Hen. VIII. c. 1, and also by their statutory recognition in the First Prayer-Book of Edward VI. (3 & 4 Edw. VI. c. 10). On appeal to the Privy Council, Cairns, C., seems to have considered that so far as the injunctions could be taken to authorise any ceremony, they were abrogated by the Elizabethan Act of Uniformity, 1 Eliz. c. 2 (but as to this, see the argument in *Read* v. *Bishop of Lincoln*, 1890, P. D. 9, at pp. 82, 83). They were again treated as valid in *Boyd* v. *Phillpotts*, 1874, 4 Ad. & Ec. 297, by Sir R. Phillimore, Dean of Arches; but on appeal the Judicial Committee found it unnecessary to determine the point (*Phillpotts* v. *Boyd*, 1875, L. R. 6 P. C. 435).

Injunctions of Queen Elizabeth.—The injunctions of Queen Elizabeth (for which see Cardwell, *Documentary Annals of the Church of England*, p. 210) were injunctions issued by the Queen in the year 1559 "by the advice of Her Most Honourable Council." Their chief object was, like those of Edward the Sixth, to remove superstitious practices, and they appear to have been drawn up under the direction of the more extreme supporters of the Reformation.

In so far as they deal with the ornaments of the church and ministers thereof, they possessed no legal effect, as they were not made an order taken by the authority of the Queen with the advice of her Commissioners appointed under the Great Seal of England for causes ecclesiastical, or of the Metropolitan of the realm, as provided by the Act of Uniformity, 1 & 2 Eliz. c. 2, ss. 25, 26 (*Ridsdale* v. *Clifton*, 1877, 2 P. D. 276). They have, however, been at times treated as having some authority for other purposes (see *Faulkner* v. *Litchfield*, 1845, 1 Rob. Eccl. 184). See also articles LIGHTS ON ALTAR; ORNAMENTS, RUBRIC; UNIFORMITY, ACTS OF.

[*Authorities.*—Strype, *Ann.*; Burnet, *History of the Reformation*; Cardwell, *Documentary Annals of the Church of England*; Fuller, *Church History*; Phillimore, *Eccl. Law*, 2nd ed.]

Injuria.—The maxims which declare that an action lies for *injuria sine damno*, but not for *damnum absque injuria*, afford no real assistance to determine whether an action will lie or not, inasmuch as *injuria* can only

be defined as the infringement of a legal right. The maxims are, moreover, actually misleading, for there is a well-known class of actions in which special damage must be proved as part of the cause of action (vol. iv. p. 104), *e.g.* certain actions for slander (vol. iv. p. 182). It has, however, long been customary to collect cases where nominal damages may be recovered for the breach of a legal right under the head "*injuria sine damno*," or "*ubi jus, ibi remedium*." The best-known enunciation of the last rule is to be found in the judgment of Lord Holt, C.J., in *Ashby* v. *White* (1704, Raym. (Ld.) 938; 1 Smith, *L. C.*), where it was held by Lord Holt and the House of Lords that an action lay against a returning officer for rejecting a vote, which, if cast, would have been utterly useless, because it was given for the successful candidate. Lord Holt said, "every injury imports damage." This means only, as the next paragraph shows, that some legal rights may be infringed without causing pecuniary damage to their possessor. Cases of trespass to land and of interference with easements (*Harrop* v. *Hirst*, 1868, L. R. 4 Ex. 43; *Siddons* v. *Short*, 1877, 2 C. P. D. 572) are examples sometimes explained by the consideration that continuance of an interruption of the possession would ultimately destroy the owner's title.

On the other hand, there are many cases in which a person injured by the act of another has no cause of action against him; his loss is said to be *damnum absque injuria*. The following are some examples: lawful acts upon the other's own property (*Mayor of Bradford* v. *Pickles*, [1895] App. Cas. 587), but entailing an interference with the flow of underground water (*Chasemore* v. *Richards*, 1859, 7 H. L. 349), or with a prospect, or with the enjoyment of LIGHT or SUPPORT from neighbouring land, where there is no easement; permitting an injurious growth of thistle down (*Giles* v. *Walker*, 1890, 24 Q. B. D. 656); ordinary business competition (see *M'Gregor* v. *Mogul Steamship Co.*, [1892] App. Cas. 25); inducing a third person not to enter into a contract (*Allen* v. *Flood*, [1898] App. Cas. 1); DEFAMATION by privileged statements; legal proceedings reasonably undertaken (see MALICIOUS PROSECUTION)—for such proceedings party and party costs, where the law gives them, are the only remedy; acts authorised to be done by statute (*Geddes* v. *Proprietors of the Bann Reservoir*, 1878, 3 App. Cas. 430; see also ACCIDENT).

[*Authorities.*—The note to *Ashby* v. *White* in Smith, *L. C.*; Broom, *Maxims*, 6th ed., p. 186.]

Injuria (de).—The replication *de injuria* ("the defendant of his own wrong, and without the alleged cause") under the system of pleading in vogue before the Common Law Procedure Acts was a general traverse, coupled with a tender of issue allowed in certain actions (trespass, case, replevin). Its proper office was to deny the facts set up as an excuse by the defendant's plea (*Crogate's* case, 8 Co. 66 *b*; and *Jones* v. *Kitchen*, 1787, 1 Bos. & Pul. 77; Stephen on *Pleading*, ed. 1824, p. 186).

Injuriously affected.—The words "injuriously affected by the execution of the works" in sec. 68 of the Lands Clauses Consolidation Act, 1845, have been discussed in a large number of compensation cases. In *M'Carthy* v. *Metropolitan Board of Works*, 1873, L. R. 8 C. P. 191, they were discussed by Bramwell, B., at pp. 208, 209, where he said: "I agree that the word 'injuriously' does not mean 'wrongfully' affected. What is done is rightful under the Act. It means hurtfully or 'damnously'

affected. As when we say of a man that he fell and injured his leg, we do not mean that his leg was wronged, but that it was hurt. We mean he fell, and his leg was injuriously, that is to say hurtfully, affected. At the same time I am clearly of opinion that, to entitle the parties interested to compensation, the injury or hurt must be such as could not lawfully be inflicted except by the powers of the Act. . . . The lands must be 'injuriously affected' by reason of the *exercise* as regards such lands *of the powers of the Act.* The act, therefore, 'injuriously affecting' must be one which would be wrongful but for the statute." In the same case in the House of Lords (1874, L. R. 7 H. L. 243) the test, submitted in argument by Mr. Thesiger and adopted by the Lord Chancellor, as to whether land has been "injuriously affected" so as to entitle a person to compensation was stated thus: "Where by the construction of works there is a physical interference with any right, public or private, which the owners or occupiers of property are by law entitled to make use of, in connection with such property, and which right gives an additional market value to such property, apart from the uses to which any particular owner or occupier might put it, there is a title to compensation, if, by reason of such interference, the property, as a property, is lessened in value." It was also said in the same case, "that wherever an action might have been brought for damages, if no Act of Parliament had been passed, the case is brought within the class of cases in which the property is 'injuriously affected' within the meaning of the Act." But the general rule, that compensation can only be given for that which, unless sanctioned by the company's private Act, would otherwise have been an actionable wrong, has no application where something is done on land compulsorily taken from a person which "injuriously affects" his other land (*In re Stockport, etc., Railway*, 1864, 33 L. J. Q. B. 251, approved in *Cowper Essex* v. *Acton Local Board*, 1889, 14 App. Cas. 153). Where land has not been taken, or where the damage complained of has not been done on the land taken, compensation can only be given in respect of lands "injuriously affected" by the execution of the works authorised by the Act of Parliament; no compensation can be given for damage caused by their subsequent user (*Hammersmith and City Railway* v. *Brand*, 1869, L. R. 4 H. L. 171; *Cowper Essex* v. *Acton Local Board*, *supra*). See also on this subject: *Caledonian Railway* v. *Walker's Trustees*, 1882, 7 App. Cas. 259; *Ford* v. *Metropolitan Railway*, 1886, 17 Q. B. D. 12; and titles COMPENSATION; LANDS CLAUSES ACTS.

Injurious to Health.—An effluvium is "injurious to health" within the meaning of sec. 114 of the Public Health Act, 1875, which has the effect of causing sick persons to become worse (*Malton Board of Health* v. *Malton Manure Co.*, 1879, 4 Ex. D. 302).

Inland.—This term has been generally taken to mean demesne land, as distinguished from *outland* or that let to tenants, but according to Mr. Elton (*Tenures of Kent*, 33) it includes all that was given to the borderers who, with the serfs and cottagers, cultivated the lord's demesne.

Inland Bill of Exchange.—See vol. ii. p. 95 (*ad fin.*), and p. 106 (*Conflict of Laws*).

Inland Revenue.

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SUBJECT-MATTER.—By the inland revenue of the United Kingdom is meant the revenue which is collected or imposed, as (*a*) stamp duties, (*b*) taxes, and (*c*) excise duties (1890, c. 21, s. 39).

STAMP DUTIES fall into four classes—

Those imposed upon written instruments, most of which are specified in the Stamp Act, 1891 (54 & 55 Vict. c. 39). See STAMPS.

Those imposed in respect of property passing on death. See ACCOUNT DUTY; DEATH DUTIES.

Those imposed in respect of fees (see Public Off. Fees Act, 1879, c. 58, s. 5).

Postage duties (3 & 4 Vict. c. 96, s. 21). See POST OFFICE.

TAXES is the expression used to denote assessed taxes, which are (1) HOUSE TAX; (2) INCOME TAX; (3) LAND TAX.

EXCISE DUTIES include (1) duties on goods manufactured in the United Kingdom, namely, BEER, CHICORY, and SPIRITS; (2) licences known as excise licences; (3) railway passenger duties (10 & 11 Vict. c. 42, ss. 1, 2).

These different classes of duties, when first instituted, were put under the MANAGEMENT of different Boards for each class and for each part of the United Kingdom.

A single Board of Excise was created in 1823 (4 Geo. IV. c. 23), with assistant commissioners for Scotland and Ireland, who were abolished in 1834 (4 & 5 Will. IV. c. 51, s. 1).

A Board of Stamps was created in 1827 (7 & 8 Geo. IV. c. 55), and was amalgamated with the Commissioners of Taxes in 1834 (4 & 5 Will. IV. c. 60), and with those of Excise in 1849 (12 & 13 Vict. c. 1), under the name, which still continues, of Commissioners of Inland Revenue (Highmore, p. 2).

Considerable progress has been made towards simplifying the law as to the imposition and collection of inland revenue by four statutes, namely—

The Taxes Management Act, 1880 (43 & 44 Vict. c. 19);

The Inland Revenue Regulation Act, 1890 (53 & 54 Vict. c. 21);

The Stamp Duties Management Act, 1891; and

The Stamp Act, 1891 (54 & 55 Vict. c. 39).

But the enactments relating to death duties, EXCISE, HOUSE TAX, INCOME TAX, and LAND TAX are still numerous, unconsolidated, and perplexing. In all the unconsolidated Acts prior to 1851 it is necessary to read in the name of the Board of Inland Revenue and their officers, in substitution for the old commissioners and their officers, *e.g.*, as to excise licences (12 & 13 Vict. c. 1, s. 16), and as to all statutes, bonds, securities, deeds, or other instruments in writing (53 & 54 Vict. c. 21, s. 37 (2)).

The department of the Inland Revenue, subject to the control of the Treasury and the Auditor-General, is now governed by the Commissoners of

Inland Revenue, at present four in number, who are appointed during pleasure (1890, s. 1) by letters patent under the Great Seal. Fresh letters are issued on the appointment of a new Commissioner. Two Commissioners form a quorum, except where any statute or regulation allows one Commissioner to act (1890, s. 3). The headquarters of the department were fixed at Somerset House by Treasury minute of Nov. 2, 1852, made under 12 & 13 Vict. c. 1, s. 5. The buildings of the central and local offices are vested in the Commissioners of Works and Public Buildings (44 & 45 Vict. c. 10, ss. 2, 3) in Great Britain, and in Ireland in the Irish Commissioners for Public Works (45 & 46 Vict. c. 17, s. 2).

The Commissioners have all necessary power for carrying into effect any Inland Revenue Act, and it is their duty to collect and cause to be collected every part of the inland revenue (1890, c. 21, ss. 1 (2), 13 (1)). In the exercise of their duty they are subject to the authority, direction, and control of the Treasury, and bound to obey all Treasury orders and instructions issued to them (1890, c. 21, s. 1 (2)).

The Commissioners are liable to a writ of mandamus for breach of any statutory duty (*Commissioners for Special Purposes of Income Tax* v. *Pemsel*, [1891] App. Cas. 351); but appear not to be liable to action, at anyrate in their official capacity. Even if so, they and subordinate officers are within the Public Authorities Protection Act, 1893 (c. 61), and the latter are further protected where they have made seizures upon probable cause (1890, c. 21, s. 29). The Commissioners are not bound by nor liable for the acts of their subordinate officers, and cannot be forced to disclose any official transactions or documents (*Tierney* v. *Ballingale*, 1896, 60 J. P. 152; *Hughes* v. *Vorgas*, 1893, 9 T. L. R. 471, 551).

Offences, Privileges, etc.—Both the Commissioners and all subordinate officers are exempt from service as mayor, sheriff, or in any corporate or parochial office, or on any jury, or in the militia (1890, c. 21, s. 8); and all such persons are incapable of sitting or voting in the House of Commons (5 W. & M. c. 7, s. 59; 7 & 8 Geo. IV. c. 53, s. 8; 1890, c. 21, s. 37 (2)) so long as they hold office, but not when they are superannuated or pensioned (1867, c. 15, s. 1). There is no statutory disqualification as to sitting in the House of Lords (see Highmore, p. 16).

Officers.—An Accountant and Comptroller-General of Inland Revenue is appointed, during the pleasure of the Treasury, by the Commissioners with the sanction of the Treasury (1890, s. 6; Highmore, p. 14).

A similar procedure is adopted in appointing the Comptroller of Legacy and Succession Duties, and the solicitor and assistant solicitor to the department (Highmore, p. 11).

Surveyors and inspectors of assessed taxes, and, in Scotland, collectors also, are appointed by the Treasury (1880, c. 19, ss. 17, 81).

With these exceptions, the Commissioners, unless the Treasury otherwise directs, appoint all collectors, officers, and other persons required to collect, receive, manage, and account for inland revenue (1890, s. 4 (1)).

The appointment of subordinate officers is made during the pleasure of the Commissioners (*Worthington* v. *Robinson*, [1896] 17 July, C. A., noted Highmore, p. 11), who may suspend, reduce, discharge, or restore any officer as they see cause (1890, c. 21, s. 4 (3)), without incurring any personal liability or entailing any liability on the Crown (*Shenton* v. *Smith*, [1895] App. Cas. 229; *Dunn* v. *R.*, [1896] 1 Q. B. 116).

Declarations on taking office are regulated by secs. 1–5 of the Statutory Declarations Act, 1836, and the warrants printed in St. R. & O., Rev., vol. vi. pp. 431–434.

Salary, Superannuation, Pension, etc.—The Commissioners and the officers and employees of the department are within the provisions of the Acts relating to Pensions and Superannuations of Civil Servants, 4 & 5 Will. IV. c. 24; 22 Vict. c. 26; 47 & 48 Vict. c. 57; 50 & 51 Vict. c. 67; and 55 & 56 Vict. c. 40, and to a series of Treasury minutes, warrants, and rules, printed in Highmore, pp. 138–198, and St. R. & O., Rev., vol. v. p. 155, and in case of lunacy may receive an allowance under sec. 335 of the Lunacy Act, 1890 (53 & 54 Vict. c. 5). The salary and the pension or superannuation allowance, unless commuted, cannot be assigned or taken under legal process before payment to the Commissioner or other official (1890, c. 21, s. 9), but can be dealt with under sec. 53 of the Bankruptcy Act, 1883, and, if commuted, can be alienated or taken in execution (*Crowe* v. *Price*, 1889, 22 Q. B. D. 429).

Security.—Security may be required from any officer authorised to receive or collect, or to have in his custody or possession, any money arising from inland revenue (1890, c. 21, s. 4 (4)).

Officers of excise give security by means of payment into a mutual guarantee fund, regulated by general orders of 16th February 1852 and 17th May 1886 (Highmore, p. 13). Other officers give security—

(*a*) by bond, with or without sureties, or the security of an approved guarantee society (1875, c. 64, s. 2);

(*b*) by deposit of public stock or Exchequer or Treasury bills (1836, c. 28; 1838, c. 61; 1890, c. 21, s. 5).

Misconduct.—Officers of excise who deal or trade in exciseable goods, or are concerned in a trade subject to excise duty, are guilty of misdemeanour, and on conviction forfeit their office and become incapable of future employment under the Crown (1890, c. 21, s. 7).

Any Commissioner or person concerned with inland revenue who directly or indirectly asks for or receives a bribe, or enters into or acquiesces in any collusive agreement to conceal or connive at any act which does or may defraud the Crown, on conviction incurs a fine of £500 and becomes incapable of future employment under the Crown (1890, c. 21, s. 1 (1)). This provision is in addition to the common law as to EXTORTION and misconduct in a public office (see 3 Edw. I. c. 26; *R.* v. *Burdett*, 1696, 1 Raym. (Ld.) 148; *R.* v. *Bembridge*, 1783, 3 Doug. 327).

OFFENCES AGAINST THE INLAND REVENUE.—In addition to the offences dealt with under the different heads of inland revenue, death duties, excise, house tax, income tax, land tax, and stamps, the following offences against the revenue are specially punishable:—

1. Bribing or colluding with an officer of the Inland Revenue to commit a breach of official duty, or collude or connive in a fraud on the Crown. Fine £500. If the offender, before information is lodged against him for the offence, informs against another offender, he can discharge and acquit himself of the penalty (1890, c. 21, s. 10 (2) (3)).

2. Obstructing or hindering officers of the revenue, or any person acting in their aid, in discharge of their official duty or exercise of their official powers. Fine £100 (1890, c. 21, s. 11).

3. Unlawfully pretending to be an officer of Inland Revenue to get admission to a house, or do anything which he could not do of his own authority, or for any unlawful purpose, misdemeanour, punishable alternatively on summary conviction (1890, c. 21, s. 12).

PROCEDURE.—The Inland Revenue Commissioners have no longer power themseves to hear or determine proceedings for fines or penalties or condemnation of goods seized in the metropolitan police district and city

of London, and their powers in that respect are transferred to Courts of summary jurisdiction, subject to appeal by either informant or defendant to Quarter Sessions (7 & 8 Geo. IV. c. 52, s. 82; 1890, c. 21, ss. 21 (3), 37 (1)).

With certain exceptions, legal proceedings may not be instituted in any Court in England to recover a fine, penalty, or forfeiture under an Inland Revenue Act, or to obtain condemnation of goods seized or forfeited, except by order of the Commissioners, and in the name of an officer of Inland Revenue, or of the Attorney-General (1890, c. 21, s. 21 (1); *Dyer* v. *Tully*, [1894] 2 Q. B. 794). The exceptions are: (*a*) summary proceedings for conviction on immediate arrest under an Inland Revenue Act (1860, c. 113, s. 39; 1890, c. 21, s. 21 (2)); (*b*) summary proceedings by an officer of the peace, if authorised to proceed under the Excise Acts (*e.g.* 41 & 42 Vict. c. 15, s. 23; 42 & 43 Vict. c. 21, s. 21).

High Court.—All proceedings under Inland Revenue Acts for fines or penalties or the condemnation of goods may be instituted in the High Court within two years after the liability has accrued (1890, c. 21, s. 22). The procedure is regulated by the Queen's Remembrancer Act, 1859 (c. 21), and the Crown Suits Act, 1865 (c. 104), and the rules made thereunder, which are unaffected by the Judicature Acts, except by substitution of the Queen's Bench Division for the Court of Exchequer (see EXCHEQUER PRACTICE; EXTENT; and Highmore, pp. 27, 36). Any process issued for such proceedings may be served in Scotland or Ireland (1890, c. 21, s. 23).

The procedure for condemnation of seizures is also subject to secs. 25, 26 of the Act of 1890. Prisoners in custody for offences against the inland revenue are brought up for trial under 24 & 25 Vict. c. 91, s. 46.

Summary Remedies.—Summary proceedings may be taken, subject to order of the Commissioners, in the following cases (subject to secs. 25, 26 of the Act of 1890 as to condemnation of seizures):—

(1) For offences against the excise laws (7 & 8 Geo. IV. c. 53, ss. 65, 82; 4 & 5 Will. IV. c. 51; 4 & 5 Vict. c. 20; 42 & 43 Vict. c. 49, 53), the Acts as to medicine stamp duties, and playing-cards, and the Stamp Duties Management Act, 1891, c. 38, s. 26, and the Inland Revenue Regulation Act, 1890, c. 21, s. 36. Prosecution must be within six months of the offence, excluding the day of commission (*Radcliffe* v. *Bartholomew*, [1892] 1 Q. B. 161).

(2) Offences involving liability to a pecuniary penalty not exceeding £20 under the Taxes Management Act, 1880, or the Acts as to *house tax* income tax, or land tax, or to penalties not exceeding £20, directed to be added to the assessments (1880, c. 19, s. 21).

Prosecution must be within twelve months of the offence, excluding the day of commission.

Besides their general powers the Commissioners have powers to proceed—

(3) For penalties imposed by the customs laws (7 & 8 Geo. IV. c. 53, s. 38; 9 Geo. IV. c. 44; 4 & 5 Will. IV. c. 51, s. 28; 26 & 27 Vict. c. 7, s. 13; 39 & 40 Vict. c. 36, ss. 255, 260; 42 & 43 Vict. c. 21, s. 11).

(4) For penalties imposed by the Licensing Acts, 1872 and 1874 (35 & 36 Vict. c. 94, s. 53).

(5) For penalties imposed by the Post Office Protection Act, 1884 (47 & 48 Vict. c. 76, s. 7).

Officers of Inland Revenue or persons employed or authorised by the Commissioners or Solicitor of Inland Revenue may prosecute or defend in a Court of summary jurisdiction (1890, c. 21, s. 27); and in legal proceedings

in County Courts relating to inland revenue, any admitted solicitor, whether a clerk to another solicitor or not, is entitled to audience on behalf of the Commissioners (1896, c. 28, s. 38) (see *R.* v. *Snagge*, [1894] 2 Q. B. 440). If the authority is challenged, it is sufficiently proved by production of the officer's appointment (1890, c. 21, ss. 4 (2), 24 (3)) or general authority (*Dyer* v. *Tully*, [1894] 2 Q. B. 794; *R.* v. *Turner*, 1894, 58 J. P. 320).

Seizures.—Goods forfeited under Inland Revenue Acts, and vessels, cattle, carts, etc., used to remove, deposit, or conceal them, may be seized by any officer or employé of the Inland Revenue, or person acting in his aid; and after condemnation in the prescribed manner, may be disposed of under the Inland Revenue Regulations, or sold at a price, in case of goods seized for duties, not less than the duty, or in the case of prohibited goods may be sold for export only (1890, c. 21, ss. 25, 26, 30, 31).

Costs, Fines, and Rewards.—Fines, penalties, and the proceeds of forfeitures, and costs, charges, and expenses recovered, are accounted for, or paid to, or as directed by, the Commissioners, and applied to the use of the Crown, unless otherwise appropriated, *e.g.* prosecutions for keeping dogs without licence, and the proceeds of local taxation licences (1890, c. 21, s. 33).

Informers may be rewarded, but not to an amount over £50 without assent of the Treasury (1890, c. 21, s. 32). Fines, etc., may be mitigated and proceedings stayed or compounded by the Commissioners, and the Treasury may, before or after judgment, intervene to mitigate or remit fines or restore forfeitures (1890, c. 21, s. 35; *Alston's Trustees* v. *Lord Advocate*, 1895, 33 Sc. L. R. 278).

Costs of Administration, Accounts, and Audit.—The charges of the collection and management of inland revenue are paid out of money provided by Parliament (17 & 18 Vict. c. 94, ss. 1, 6, 7, Sched. B). These charges include—(1) Superannuations, pensions, compensations, and annuities granted in respect of former service in the Inland Revenue Department (19 & 20 Vict. c. 59); (2) the costs, charges, and expenses of proceedings to recover penalties and forfeitures under Acts relating to inland revenue, and sums allowed as rewards to informers (53 & 54 Vict. c. 21, s. 34). Until 1891 there was a Receiver-General of Inland Revenue, but in that year the office was abolished and the Commissioners substituted for him, as to all statutes, bonds or documents, payments or securities (1891, c. 24, s. 2 (4)); and now all moneys and securities for money collected or received in Great Britain for or on account of inland revenue, except sums legally paid thereout, are paid or remitted to the Bank of England in accordance with regulations made by the Commissioners with the approval of the Treasury, and placed to an account in the books of the bank, entitled "The General Account of the Commissioners of Inland Revenue." Among the sums which may legally be paid out are—

(1) Discount for purchase of stamps and allowance for stamps spoiled or rendered useless (54 & 55 Vict. c. 98, s. 9).

(2) Drawbacks, bounties, or allowances in the nature of drawbacks (29 & 30 Vict. c. 39, s. 10). And see Customs; Excise.

(3) Repayments of income tax and other assessed taxes (29 & 30 Vict. c. 39, s. 10).

(4) Payments into the local taxation accounts under the Exchequer and Audit Act, 1866. Subject to these deductions, the gross revenue must be paid into the Exchequer, and daily returns must be sent to the Auditor-General. This rule must now be read subject to sec. 1 (3) of the Public Accounts and

Charges Act, 1891 (c. 24), which directs that payments or transfers from the Inland Revenue account to the account of the Exchequer, or of any other public department of State, and other payments necessarily to be made out of the Inland Revenue account, are to be made; and the accounts of the Inland Revenue with the bank are to be kept under regulations prescribed or approved by the Treasury. The Irish receipts are paid into the Bank of Ireland to the Exchequer account, or as directed by the Treasury (1891, c. 24, s. 1 (2)).

All officers intrusted with the collection, receipt, and custody of inland revenue must keep and render accounts, in the manner and form prescribed by the Commissioners, of all sums collected or received by them or intrusted to their custody, and, if required, verify them by statutory declaration. Neglect or omission to keep or render the accounts is a misdemeanour, and conviction disqualifies the offender from ever holding office under the Crown (1890, c. 21, s. 14). They must also apply and remit all moneys and securities at the time and in the manner and form prescribed by the Commissioners, on pain of forfeiting office and liability to treble the amount of the money or security (1890, c. 21, s. 15). These payments are exempt from stamp duty (1891, c. 39, Sched. 1; Receipt of Money, Payment of Money).

Distinct accounts of every part of the inland revenue are kept by the Commissioners at Somerset House, in which are set out—

(1) The accounts (*a*) charged, (*b*) collected and received, (*c*) in arrear under each head.

(2) The payments made or allowed in respect of each part.

(3) The expenses of collection and management.

(4) All other payments and expenses whatsoever.

They are made up for a financial year ending March 31 (17 & 18 Vict. c. 94, s. 2; 52 & 53 Vict. c. 63, s. 22).

Quarterly accounts of all revenue paid into the Exchequer are also made up (1866, c. 39, ss. 12, 23).

[*Authority.*—Highmore, *Inland Revenue Regulation Acts*, 1896.]

Inland Sea—A sea, that is, a larger expanse of water than it is usual to call a lake, surrounded by land of still larger expanse. The legal position of such a sea, when accessible by a navigable strait, has given rise to controversy, but, in practice, States acknowledge that inland waters surrounded by the territory of the same State, and serving only as a means of access to the ports of the State by whose territory they are surrounded, though communicating with the high sea, if the channel of communication, by its narrowness and the configuration of the coast, practically severs such waters from the open sea, are classed with national rivers and their estuaries as inland waters.

When the surrounding territory belongs to different States, the inland sea becomes international and open to all except that the rights in connection with it may be made dependent upon treaties between the different States directly interested.

In a recent case (*The Emperor of Japan* v. *The Peninsular and Oriental Steam Navigation Co.*, J. C., [1895] App. Cas. 644) the position of the inland sea of Japan came under discussion in connection with the collision which took place in 1892 between the *Ravenna*, a vessel belonging to the Peninsular and Oriental Co., and the *Chishima*, a public ship belonging to the Japanese Government. The *Chishima* was sunk, a number of lives were lost, and the

Ravenna suffered serious damage. The Japanese Government brought an action against the steamship company, and the case was tried in the first instance before the British Consular judge at Kanagawa, who held the inland sea with its four entrances—two extremely narrow, the third under two miles in width, and the fourth with two branches, the wider of which is about four miles wide—to be Japanese territorial waters. On appeal to H.B.M.'s Supreme Court at Shanghai, this decision was reversed, and the inland sea declared to be part of the highway of nations, and therefore a part of the high sea. On further appeal to the Judicial Committee of the Privy Council, the question of the territorial character of the inland sea of Japan was not gone into. "In the view," said Herschell, L.C., "which their lordships take, it is unnecessary to decide the question on which the Chief Justice of the Supreme Court and the judge of the lower Court differed. They think it, however, right to say that they must not be regarded as sanctioning the very broad propositions affirmed by the Chief Justice, which are obviously open to serious controversy" (see MARE CLAUSUM; TERRITORIAL WATERS).

In lieu of.—A legacy given "in lieu of" a previous gift to the same legatee is to be raised out of the same fund and is subject to the same conditions as the original gift (*Crowder* v. *Clowes*, 1794, 2 Ves. 449); and this general rule prevails although the substituted legacy can only in part be paid out of the same fund (*In re Colyer*, *Millikin* v. *Snelling*, 1886, 55 L. T. 344; see also Theobald, *Law of Wills*, 4th ed., pp. 125, 126). See INSTEAD OF.

In like manner.—Where a person, who was seised in fee of a freehold estate and was also possessed of certain copyholds descendible by the custom of the manor to the youngest son, by an antenuptial settlement settled his freehold estate to the use of himself and his intended wife for life, remainder to his heirs on the body of his wife begotten, and also covenanted to surrender the copyholds "to the use of himself and his said intended wife and the heirs of their two bodies to be begotten 'in like manner,' and to the same uses as the freehold lands and tenements therein before mentioned are settled and conveyed," it was held that the words "in like manner" only meant that both estates should be entailed, not that the eldest son, who took the freehold estate, should also take the copyholds; the youngest son therefore was held entitled to take as heir in tail to the copyholds (*Roe* v. *Aistrop*, 1779, 2 Bl. 1228). In *Lewis* v. *Puxley*, 1847, 16 Mee. & W. 733, a testator devised his real estate "to my eldest son John for his life and to his eldest legitimate son after his death, and in default of such issue, I give it in like manner to my son Richard, and in case that he has no legitimate issue male, I give it in like manner to the offspring about to be born from my wife," with remainder to the testator's right heirs. There Platt, B., said that "the words 'in like manner' import a gift of the same estate with respect to Richard as was previously given to John. The testator must have intended that John should take an estate tail, otherwise he would not have used words which created one in Richard."

Inner Temple.—See INNS OF COURT.

Innings—Lands recovered from the sea by draining, as in Romney Marsh (Cowel, *Law Dict.*).

Inn; Innkeeper.—1. An innkeeper (anciently known as an hosteler or hostler, F. N. B.) is one who makes it his business to entertain travellers and passengers, and provide lodging and necessaries for them and their horses and attendants (Bac. *Abr.* "Inns"). The definition of "inn" in the Innkeepers Liability Act, 1863 (26 & 27 Vict. c. 41) is: "any hotel, inn, tavern, public-house, or other place of refreshment, the keeper of which is now by law responsible for the goods and property of his guests." An inn is distinguishable from an alehouse, which is a mere drinking or refreshment house (Bac. *Abr.* "Inns"; *R.* v. *Rymer*, 1877, 2 Q. B. D. 136), a boarding-house (vol. ii. p. 201), or apartments (vol. i. p. 264), and a coffee-house (*Doe* v. *Laming*, 1814, 4 Camp. at p. 77; 15 R. R. 728). Keeping an inn is one of the "common employments" to which the common law attached special obligations and privileges arising independently of, although capable of modification or extension by, any contract between the innkeeper and his guest (see Holmes on the *Common Law*, p. 16). Thus an innkeeper is liable for lost goods though he is known to be insane (Com. *Dig.* "Action of the Case for Negligence," B.; Bac. *Abr.* "Inns," C. 4; *Cross* v. *Andrews*, 40 Eliz. Cro. (1) 622). The digests cited differ as to whether he would be liable if an infant. The obligations are cast upon the innkeeper himself, and it is he who must be indicted or sued, although the inn may be under the care of a licensed manager (*Dixon* v. *Birch*, 1873, L. R. 8 Ex. 135). Keeping an inn which from its situation and the number of other inns was unnecessary, or which was the resort of thieves, etc., is said to have been an indictable nuisance (Bac. *Abr.* "Inns," A.).

2. The relationship of innkeeper and guest exists although the latter stay for a week or more (*Cayle's* case, 26 Eliz. 8 Co. 32; 1 Smith, *L. C.*; see below, 3.), but not where the guest is a visitor of the innkeeper (*l.c.*), nor where he hires a room for a fixed period (Com. *Dig. ubi supra*), or under a special agreement (vol. ii. p. 201), or for a special purpose out of the ordinary course, *e.g.* if a commercial traveller takes a room to show his wares (*Farnworth* v. *Packwood*, 1816, Stark. N. P. 249; *Burgess* v. *Clements*, 1815, 4 M. & S. 306; 16 R. R. 473). And it may exist where only occasional refreshment is supplied. It is not necessary that the guest should intend to stay a night (*Bennett* v. *Mellor*, 1793, 5 T. R. 272—a doubtful case; *Medawar* v. *Grand Hotel Co.*, [1891] 2 Q. B. 11). In the case last cited a majority of the Court held that a railway passenger who went to a hotel for breakfast and was allowed the use of a bedroom to wash in, was a guest (cp. *Strauss* v. *County Hotel Co.*, 1883, 12 Q. B. D. 27). Goods, such as luggage (*l.c.*), which are not paid for if left at an inn where their owner is not staying, or goods bailed with the innkeeper, *e.g.* to wait for a carrier (*Williams* v. *Gesse*, 1837, 3 Bing. N. C. 849), are not in the custody of the innkeeper as such (Bac. *Abr.* "Inns," 5); the same has been held of a carriage at livery (*Smith* v. *Dearlove*, 1848, 6 C. B. 132); the contrary was held, in an earlier case, of a horse whose keep must be paid for (*York* v. *Grindstone*, 1705, 1 Salk. 388). Soldiers billeted at an inn (vol. ii. p. 91) are guests (*Bac. Abr.* "Inns," 5).

3. An innkeeper is liable to receive, and to find food and lodging at reasonable prices for, all *travellers*, if he have room (Bac. *Abr.* "Inns," C.; *Lamond* v. *Richard*, [1897] 1 Q. B. 541). He is not bound to provide clothing (Bac. *Abr. ibid.*), or post-horses (*Dicas* v. *Hides*, 1816, 1 Star. 247).

A guest who stays for a long time ceases to be a traveller, and may be refused further accommodation (*Lamond* v. *Richard*, *supra*); and a neighbouring resident who uses the inn as a refreshment bar is not a traveller (*R.* v. *Rymer*, 1877, 2 Q. B. D. 136). The intending guest must tender payment (Bac. *Abr.* "Inns," C. 3). Anyone who comes in such a condition, or so conducts himself, as to be offensive to other guests need not be received (*R.* v. *Rymer*, *supra*). It is said that a horse and (*semble*) any other goods the keeping of which is paid for, and which are received by innkeepers in the ordinary course, must be received (above, 2.; *York* v. *Grindstone*, *supra*).

The liability under this head is criminal as well as civil (Com. *Dig.* and Bac. *Abr. ubi cit.*).

An innkeeper is also criminally liable for letting a room which a person suffering from infectious disease has occupied, without its having been disinfected (54 & 55 Vict. c. 76, s. 63; 38 & 39 Vict. c. 55, s. 128).

4. An innkeeper is liable for the loss of any of the goods of his guests which are in his custody as an innkeeper (above, 2.), unless the loss happened owing to the act of God, or of the King's enemies, or of the guest himself (Com. *Dig. ubi cit.*; Bac. *Abr.* "Inns," C. 4). The amount of his liability is now limited to £30 by the Innkeepers Liability Act, 1863, provided that the loss does not happen through the wilful act, or the default or neglect, of the innkeeper or his servant. A horse or other live animal, and gear appertaining thereto, and any carriage, are excepted from the Act; so also is property expressly deposited with the innkeeper for safe custody. The innkeeper loses the benefit of the Act if he refuses to receive the property for safe custody, but he may require it to be put in a box fastened or sealed up by the depositor. He also loses the benefit if he does not exhibit in a conspicuous part of the hall or entrance to the inn a complete (*Spire* v. *Bacon*, 1877, 2 Ex. D. 463) print in plain type of the exempting section. The effect of the Act is that if goods worth more than £30 are lost by a guest, and neither he nor the innkeeper proves that the loss was due to negligence for which the other is responsible, the guest recovers £30 only (*Medawar* v. *Grand Hotel Co.*, [1891] 2 Q. B. 11).

The innkeeper is not liable if the property is stolen by the guest's own servant or companion (*Cayle's* case, *supra*), nor if it is placed outside the limits of the inn by the guest's direction, *e.g.* if his horse is so sent to pasture (*Cayle's* case, *supra*), nor if it is lost by the guest's neglect to take ordinary care of it (*Burgess* v. *Clements*, 1815, 4 M. & S. 306; 16 R. R. 473; *Oppenheim* v. *White Lion Hotel Co.*, 1871, L. R. 6 C. P. 515; *Medawar* v. *Grand Hotel Co.*, [1891] 2 Q. B. 11).

There are some decisions which put the liability of the innkeeper for the loss of goods upon negligence, the fact of loss while the goods are in his custody being presumptive proof of negligence which may be rebutted (*Dawson* v. *Chamney*, 1843, 5 Q. B. 164; see Story on *Bailments*, s. 472), but this appears to be clearly contrary to *Cayle's* case and to the current of authority (*Morgan* v. *Ravey*, 1861, 6 H. & N. 265; *Medawar* v. *Grand Hotel Co.*, *supra*). A discussion of the point will be found in a note in Story, *l.c.*, and Wharton on *Innkeepers*, p. 131; cp. BAILMENTS, vol. i. p. 456, and CARRIER, vol. ii. p. 387).

The innkeeper is also liable for injury to the goods of his guest while they are in the inn (*Day* v. *Bather*, 1863, 2 H. & N. 14). There appears to be no just distinction, as regards liability, between injury and total loss; the duty is to keep safely. *Dawson* v. *Chamney* (*supra*) was, however, a case of injury.

The goods of a guest cannot be distrained on by the landlord of the innkeeper (*Co. Litt.* 47 *a*).

5. He is entitled to a general lien (*Milliner* v. *Florence*, 1878, 3 Q. B. D. 484; cp. the Act cited below) upon all goods brought by the guest to the inn (as a traveller (qy.)) for the board and lodging of the guest and his servants and the keep of his horses. The lien extends to goods which are not luggage, *e.g.* a piano (*Thefall* v. *Borwick*, 1872, L. R. 7 Q. B. 711, 10–210), but not if it be sent in upon hire during the guest's stay (*Broadwood* v. *Granara*, 1854, 10 Ex. Rep. 417). It also extends to goods which are not, and are known not to be, the property of the guest, as a commercial traveller's samples (*Robins* v. *Gray*, [1895] 2 Q. B. 501), or the separate property of the guest's wife (*Gordon* v. *Selber*, 1890, 25 Q. B. D. 491).

The lien is not lost by the occasional absence of the guest during his stay, taking the goods with him (*Allen* v. *Smith*, 1862, 12 C. B. N. S. 638), nor by the innkeeper taking a security for his bill (*Angus* v. *Maclachlan*, 1883, 23 Ch. D. 330); but if he allow the goods to be taken away, and the guest subsequently return with them, he has no lien for the bill relating to the former stay (*Jones* v. *Pearle*, 1724, 1 Stra. 557). If the goods are wrongly taken away they may be recaptured upon fresh pursuit (Bac. *Abr.* "Inns," D.).

By the custom of London an innkeeper seems to have had a power to sell (*l.c.*; see Bac. *Abr.* "Inns," D.). A general remedy is now given by the Innkeepers Act, 1878. By it, in addition to his ordinary lien, an innkeeper may sell by public action any goods, chattels, carriages, horses, wares, or merchandise deposited or left with him, or in the inn or its stables, or on premises appurtenant or belonging thereto, but not before six weeks [from the time when the debt was incurred (qy.)], nor until one month after having advertised the intended sale in one London newspaper, and one country newspaper circulating in the district where the goods were deposited.

As to licences see EXCISE, vol. v. p. 106; see also BILLETING, vol. ii. p. 91.

[*Authorities.*—*Cayle's* case in Smith, *L. C.*; Bac. *Abr.* "Inns"; Com. *Dig.* "Action on the Case for Negligence," B.; text-books, Wharton, Moncrieff, Haycroft on *Innkeepers*, and Story on *Bailments*, ss. 464–471.]

Innocent Conveyance. — As prior to the Real Property Act, 1845, which altered the law in this respect, a feoffment (*q.v.*) might have created an estate by wrong, as where the feoffor purported to give a greater estate than he possessed, the other ordinary modes of conveying land were termed innocent conveyances, because they never could operate by wrong, but simply passed that estate which the grantor could lawfully convey; of these were conveyances by lease and release, by deed of grant, or by way of bargain and sale enrolled (Williams, *Real Property*, 16th ed., pp. 172, 173, 234; Goodeve, *Real Property*, 4th ed., 39).

Innocent Shippers.—As in marine insurance the assured impliedly warrants that at the commencement of the voyage the ship is seaworthy, underwriters are not liable if it appears that the ship was not in fact seaworthy, and this whether the shipper knew of the unseaworthiness or not. It is the practice, however, of underwriters, although they may to an action on a policy have a good defence in law, founded on the unseaworthiness of a vessel, to pay insurers who are "innocent shippers"—

shippers ignorant of the fact that the vessel was unseaworthy (*Brooking* v. *Maudslay*, 1888, 57 L. J. Ch. 1001).

Inns of Chancery.—See INNS OF COURT.

Inns of Court.—The four Inns of Court are situate in London, and, in English law, correspond with the Faculty of Advocates at Edinburgh in Scotch law, and with the four Inns at Dublin in Irish law. The four Inns of Court are, now, the two Honourable Societies of the Temple (viz. the "Inner" and the "Middle" Temples), Lincoln's Inn, and Gray's Inn. These four Inns of Court are the sole surviving constituent bodies of a great legal university which once existed in England. The existence of this university is spoken of by Fortescue, by Stowe, and by Coke. And in the charter under the Great Seal, granted by James I. to the two Societies of the Temple, the grantees are described as "two out of those four colleges the most famous in all Europe." This university was the cradle of English law, and its history is the story of English law from its infancy. The following is an outline of the origin, growth, and decline of this great legal university. Originally, ecclesiastics were the advocates in all the secular civil Courts. These Courts anciently sat for comparatively short periods, still known as "terms," at the various towns at which the Sovereign's Court might at the moment be. This suggested to the practitioners to form societies to provide for their temporary domestic wants while in attendance on the Courts, in much the same way as their own original monastic institutions usually did. There being, moreover, no printed books in early times, every craft then taught its apprentices orally, and by setting them to begin their instructions by learning the very rudiments of the craft they were going to follow. Every craft, during the same period, formed a guild for itself, to protect its interests and to supply its members with trade information. Societies or associations of lawyers were formed, partly on the model of monastic institutions and partly on that of guilds. These societies or associations amongst the lawyers consisted of three classes, viz. (1) *Serjeants' Inns*, where those who were alone capable of being judges, either in the Royal Courts or on circuits, dwelt together; (2) *Inns of Court*, which comprised advocates in the Courts, who had not arrived at the degree of serjeants, and also the more advanced apprentices; (3) *Inns of Chancery*, where dwelt the "clerks of the Chancery," who prepared the original writs which issued from the Chancery, together with the youngest of the apprentices to whom the clerks of the Chancery were teaching the rudiments of legal craft, by setting them to copy them and otherwise how to prepare writs and other legal documents. All these societies dwelt in "hostels," hired by them respectively from time to time. The "hostels" thus hired were, naturally, those in which the ecclesiastics were in some way interested. The reign of King John saw the culmination, in the grant of Magna Carta, of a great English revival, which had commenced under the Conqueror himself, had lasted through the reigns of his successors (see Green's *English People*, 1875 ed., pp. 84–94), and had already conferred upon the English the peculiarly English institution of trial by jury, in the reign of Henry II., and regular circuits of judges or assizes. Just previously to the grant of Magna Carta (1215) the clergy were prohibited (1207) from any longer practising in secular Courts. These things all made the establishment of a school of English law an imperative necessity, and

Magna Carta facilitated its establishment by ordering the Common Pleas, which was then the only Court for the trial of civil disputes between subject and subject, to be fixed in one ascertained place. Accordingly, not only were schools for the teaching of civil law prohibited (1224)—as indeed they had been more than once before (*e.g.* in Stephen's time)—but a few years later royal proclamations issued by Edward I. in 1290–1292 ordered "students apt and loyal" to be brought from the provinces to learn English law. It was probably about the end of the thirteenth or the commencement of the fourteenth century that the Inns of Court, whose origin, says Lord Mansfield (in *R.* v. *Gray's Inn*, 1 Doug. at p. 354), is involved in obscurity, came into existence. Certain it is that within a few years later, the hostels or lodgings of the societies forming the four Inns of Court were permanently placed on ecclesiastical properties. As early as the reign of King Stephen the principal schools of law in London were attached to the "three principal Churches" (probably St. Paul's, St. Sepulchre's, and St. Andrew, Holborn). These schools appear to have become schools for the teaching of English law early in the fourteenth century, and to have been thus as such taken into the special favour of the Crown. The dissolution of the Order of Knights Templars (1307), the circumstances of which are too long to discuss here, led to the whole property of that Order being forfeited, and, after some intermediate grants of it to Court favourites, being, by Act of Parliament (17 Edw. II. c. 7), granted to the Knights Hospitallers. This property included a "New Temple" which Knights Templars had then recently erected on the banks of the Thames, in the place of their old one in Holborn. The two societies (or one society as some say) constituting Inns of Court, became the latter's permanent tenants in the Temple. The other two societies with similar constitutions about the same time became tenants of other ecclesiastical property, one establishing itself at Lincoln's Inn (formerly part of the possessions of the See of Chichester), and the other at Gray's Inn, which had also some ecclesiastical connections. The local and individual history of each of the various Inns constituting the legal university is interesting. It is, however, too long to be told here in any detail. A history of the serjeants and their Inns is contained in Pulling's *Order of the Coif*. A history of the four Inns of Court will be found in Herbert's *History of the Four Inns of Court*, or in Pearce, *Inns of Court*. A separate history of each Inn of Court has, however, been written by Mr. Baylis, Q.C., as to the two Temples, by Mr. Spilsbury as to Lincoln's Inn, and by Mr. Douthwaite as to Gray's Inn. The Serjeants' Inns and the Inns of Chancery, either contemporaneously, or at anyrate within a short period, established themselves in the neighbourhood where the Inns of Court had become permanently located. There formerly were at least three hostels or inns inhabited by serjeants, namely (as we learn from an inquisition *post-mortem* taken in 1497 before the Lord Mayor), Scrope's Inn in Holborn (once belonging to Lord Scrope of Bolton), as well as Serjeants' Inn, Fleet Street (formerly the property of the See of Ely). The Inns of Chancery were eight, or, according to Fortescue, ten in number. Most Inns of Court had two Inns of Chancery attached to them. Those annexed to Lincoln's Inn were Thavies Inn and Furnival's Inn; to Gray's Inn belonged Staple Inn and Barnard's Inn; the Middle Temple had probably at one time annexed to it three Inns of Chancery (just as the Inner Temple had), namely, some old inn the precise name and history of which is now completely lost and cannot be traced; certainly the Strand Inn (pulled down by Protector Somerset to clear the site for Somerset House, and then merged in New Inn); and as we know New Inn (formerly Saint George's

Inn), which has been for many years the only Inn of Chancery belonging to the Middle Temple. To the Inner Temple were attached three Inns of Chancery, namely, Clifford's Inn, Lyon's Inn, and Clement's Inn. The history of the different Inns of Chancery has never been separately written, nor has their common history ever been compiled in any one book; but fragments on the subject can be found scattered throughout the various histories already named. An outline of the system of legal education given by the legal university is that the young student entered at an Inn of Chancery, and there learnt the elements of his profession. In the Inns of Chancery, as in the Inns of Court, the students were instructed by verbal discussions, called "Moots" in the Inns of Court when conducted in public, and "Bolts" when given in private by way of instruction.

The floor of each Inn of Chancery or of Court was divided into three spaces. At the extreme end stood the students, separated by a bar from the space which intervened between it and a raised dais at the top of the hall, and on the latter sat the rulers of the Inn. After a certain time, a student in an Inn of Chancery having made sufficient progress was called within this bar, and, after a *further interval*, he was called to the step at the bottom of the dais. This latter call qualified him to enter the Inn of Court to which his Inn of Chancery was attached. Students promoted from an Inn of Chancery to an Inn of Court were called "*Apprenticii Majories*" or "*Meliores*." In the Inn of Court the student went through a process similar to that which had taken place in the Inn of Chancery (anciently seven full years at least). The invitation to the dais at the Inn of Court, when it in due course came, was, however, a call to the Bar of the King's Courts, where the student thus advanced could henceforth practise, and, after three years more, have audience. Each Inn of Court appears, from Dugdale's account of the course pursued by the Middle Temple towards New Inn, to have periodically sent a reader to every Inn of Chancery attached to it, each such reader being accompanied by two under utter barristers. Each of these latter brought back to the Inn of Court those two students of the Inn of Chancery who had most distinguished themselves in a "moot" held before the reader, and they became students of the Inn of Court. Students who got called within the bar at the further end of the hall had to remain "mootmen" for eight years, *i.e.* had for that time to occupy the space between the dais and the bar behind which the students stood at the end of the hall, and it was not till they had done so for seven full years that they were eligible for call. Utter barristers, after being called three years, could appear in Court, and when of twelve years' standing might be antients or benchers, and in time readers or even "double readers." A reader was one of the antients or benchers who was called on to give a "reading" in the Inn. As in ancient times, a reader is to this day selected every Lent and Autumn, but his principal duties are to pay a substantial sum, slightly varying at the different Inns, towards furnishing a "reader's feast." "Double readers" were men who had been twice selected readers in their Inn of Court. There was usually an interval of eight or nine years between a reader's first and second reading. The "double reading" was often an elaborate discussion of the provisions of some statute or series of statutes. Littleton's "double reading on the statute," *de donis conditionalibus*, or the Statute of Westminster the Second, by which estates tail were erected, Bacon's "double reading" on the Statute of Uses, and Callis's "double reading" on the statutes relating to sewers, are all well-known instances of this. The "double readers" possessed the right of calling students to the bar, but the number that each could call was limited,

first to four, and then to eight, in any one Inn. This privilege was taken away in 1664, and the long robes and right of precedence have long disappeared. But "double readers" used anciently to wear a longer robe than others, and possessed a right of precedence in Court. Moreover, they formerly were the class from whom the Crown law officers and the serjeants were always taken. By the time of Sir Mathew Hale, the custom of entering at an Inn of Chancery before going to an Inn of Court had grown obsolete; and in our own day the destruction of two of the branches of the ancient legal university has become complete. For out of the three constituent bodies which anciently formed it, two have actually ceased to exist. The Inns of Chancery at last became possessed solely by solicitors, and some of them have been sold for other than legal purposes within living memory. The one Serjeants' Inn which had survived was, too, sold soon after the time when the Judicature Act, 1873, sec. 8, had rendered it unnecessary for future judges to be serjeants. The manner in which the legal university in the old days discharged its function of educating students, and taking care that its degree of "Utter Barrister" should only be conferred upon well-qualified men, having now been already described in outline, it still remains to be seen how the Inns of Court, who are now the only surviving members of the legal university, discharge this duty of educating students for the bar. They do this mainly through the medium of "The Council of Legal Education." This "Council of Legal Education" is a body (at present unincorporated) which consists of delegates appointed by each Inn from amongst its benchers. Under the direction of the Council, instruction is continually given to students, by means of lectures and classes, by professors appointed by it. This instruction is supplemented by lectures delivered by lecturers from time to time, also appointed by the Council. Examinations are, twice a year, held by examiners whom the Council likewise appoint. The prizes given in these modern examinations are money prizes, in place of, as was the case under the old system, those students displaying proficiency being rewarded by a call to the bar. The number of students who can be called to the bar each term is now unlimited, and the Inns call everyone who can succeed in passing the examination. In this respect the bar has but followed the example of the other learned professions. At the commencement of the reign of her present Majesty, in 1837, the Law List for that year contained the names of (approximately) only 78 serjeants, King's Counsel, and of 1330 barristers. The Law List for the year 1897 contains the names of 230 Queen's Counsel and of 8800 barristers. But, while the number of these who are annually called by them to the bar has thus enormously increased, no one has any legal right to become, or to remain, a member of any one of the Inns of Court, still less a legal right to be called to the bar. For the Inns of Court are not the subjects of the jurisdiction of the Courts of law, though, doubtless, as colleges of the great legal university, which we have seen to have once existed, they are subject to the control of the judges as visitors. It is said that this has unquestionably been the law from ancient times. We have, indeed, no evidence of any attempt being made to question this till the reign of Car. I., when, in 1642, one Booreman, a barrister of one of the Temples, having been expelled, applied for his writ of restitution, but it was denied "because there is none in the Inn of Court to whom the writ can be directed, for it is no body corporate, but only a voluntary society, and submitting to government; and the ancient and usual way of redress for any grievance in the Inns of Court was by appealing to the judges."

No one has any right, however, either to be admitted as a student (see

R. v. *Lincoln's Inn*, 1825, 4 Barn. & Cress. 855); to be called to the bar (*R.* v. *Gray's Inn*, 1780, Doug. 354); or to be restored if expelled (see *Booreman's* case, 1622, *ubi supra*).

Innuendo.—See DEFAMATION; JUSTIFICATION.

Inofficious Testament.—By the Roman law testaments might be set aside as *inofficiosa*, that is, deficient in natural duty, if they totally passed by, without assigning a good reason, any of the testator's children; but a legacy, however small, was sufficient to testify that the testator had not lost his memory or reason, which otherwise the law presumed. Blackstone (2 *Com.* 503) states that it was a common error that this rule prevailed in English law also; our law, however, does not presume either loss of memory or reason although the heir or next-of-kin are totally excluded.

In or about.—A bequest of furniture and other household effects "in or about" the testator's dwelling-house was held to include a number of articles on ground (about forty acres) appertaining to the house, such as hayricks, chicken and sheep troughs, store pigs, poultry and carriages (*In re Labron, Johnson* v. *Johnson*, 1884, 29 Sol. J. 147); but with this case should be compared *Fitzgerald* v. *Field*, 1826, 1 Russ. 427; 25 R. R. 97, where a bequest of household furniture, etc., and utensils "in and about" the testator's mansion-house was held not to pass farming utensils on land occupied by the testator along with the mansion-house. In *Lane* v. *Sewell*, 1874, W. N. 51, a bequest of all corn and other articles "in or about" the testator's dwelling-house, mill, and mill premises was held not to pass a cargo of wheat which did not in due course of transit reach the mill till some days after the testator's death. By a devise of all his goods and chattels "in and about" the testator's house and out-houses, "running-horses" were held to pass (*Gower* v. *Gower*, 1763, Amb. 612). Where a testator gave all his residuary personal estate to his wife except such parts as should be "in and about" his house, which he gave to his son, it was held that a bond and cash, both found in an iron chest, passed to the wife and not to the son (*Jones* v. *Sefton*, 1798, 4 Ves. 166).

An allegation that something occurred "in or about" a certain year does not limit the time to the year mentioned, as the words "in" and "about" so used are not synonymous (per Patteson, J., in *R.* v. *St. Paul, Covent Garden*, 1845, 7 Q. B. 240).

Inpenny and Outpenny—Money paid by the custom of certain manors on the alienation by a tenant of land within the manor.

In Person.—A party to any action or matter before the Court who conducts his own case, instead of being represented by solicitor and counsel, is said to appear in person. A party may, if he chooses, thus act for himself in any matter, except on a motion for a mandamus, which can only be made by a member of the Bar (*Ex parte Wason*, 1869, 10 B. & S. 580; see also *R.* v. *Liverpool* (*Mayor*), 1891, 55 J. P. 823). It was at one time

thought that a person who had been admitted to sue *in formâ pauperis* was not entitled to be heard in person; but where either counsel or solicitor has not been assigned to him (*Tucker* v. *Collinson*, 1886, 16 Q. B. D. 562; *Jacobs* v. *Crusha*, [1894] 2 Q. B. 37), or, it seems, where he has dismissed his solicitor (*Adams* v. *Adams*, 1890, 45 Ch. D. at p. 428), he is not precluded from appearing in person.

In personam.—Actions under the common law were classified as real, personal, and mixed (Stephen, *Pleading*, 7th ed., 4). Most real and mixed actions were abolished in 1833 (3 & 4 Will. IV. c. 27) and 1852 (15 & 16 Vict. c. 76), and the procedure of those which remained was in 1860 assimilated to that in personal actions (23 & 34 Vict. c. 126). Under the Judicature Acts real and mixed actions have wholly disappeared.

In Courts of equity all proceedings were theoretically *in personam*. The Court acted by injunction and committal for disobedience of its orders, and not by the process of common law execution on the property of the defendant. And under the present procedure all actions in the High Court are actions *in personam*, except certain proceedings *in rem* under the Admiralty jurisdiction (Dicey, *Conflict of Laws*, 265).

An action *in personam* is distinct from a personal action, both in the sense in which that term is used in the maxim "*actio personalis moritur cum personâ*," and in its sense at common law, which was an action to recover personal property, or to enforce a contract or recover damages for its breach, or to recover damages for a tort (3 Black. *Com.* 118).

So far as actions are concerned, the term "action *in personam*" belongs rather to the Admiralty Court than to those of common law. As contrasted with an action *in rem*, it means a proceeding *inter partes* before a competent Court, to which the defendants have had proper notice and opportunity of defence on the merits.

A judgment *in personam* is one in a personal action or action *in personam*. It is conclusive *inter partes*, and operates as an estoppel by *res judicata* between them, but binds only the parties or persons cited, and their rights or liabilities with respect to the subject-matter in dispute (*Sirdar Gurdyal Singh* v. *Rajah of Faridkote*, [1894] App. Cas. 670; *Ballantyne* v. *Mackinnon*, [1896] 2 Q. B. 455, 462). See ESTOPPEL; FOREIGN JUDGMENTS.

In Port.—See PORT.

In posse—Possibility of being, as opposed to *in esse* (*q.v.*), in a state of being. A child *en ventre sa mère* is a child *in posse*, but the law regards it as *in esse* for all purposes which are for its benefit (*Doe d. Clarke* v. *Clarke*, 1795, 2 Black. H. 399; 3 R. R. 430).

In Possession.—See POSSESSION.

In Pursuance.—See PURSUANCE.

Inquest.—See CORONER; OFFICE, INQUEST OF.

Inquest of Office.—See OFFICE, INQUEST OF.

Inquiry, Court of.—See MILITARY COURTS.

Inquiry (Writ of).—*Definition.*—The writ of inquiry is a judicial writ (Tidd's *Prac.*, 9th ed., p. 570; Jacob's *Dict.*, 1772, tit. "Writ of Inquiry"; Chitty's *Arch.*, 14th ed., 1331) of some antiquity, which issues after an interlocutory judgment for damages. But though it is defined as a judicial writ, it is further described as "a mere inquest of office to inform the conscience of the Court; who, if they please, may assess the damages themselves with the assent of the plaintiff, or direct them to be assessed by the proper officer" (Tidd's *Prac.*, 9th ed., p. 570).

The Interlocutory Judgment.—If an interlocutory judgment is entered against all the defendants sued, a writ of inquiry issues at once. If, however, there are several defendants, an interlocutory judgment against one or some of them does not entitle the plaintiff to proceed immediately to assess his damages under the judgment, either by writ of inquiry under Order 13, r. 5, or Order 27, r. 4, or by reference to an official referee or a Master under Order 36, r. 57. There can be only one assessment in the action (see judgment of Maule, J., in *Field* v. *Pooley*, 1842, 3 Man. & G. 756). Therefore, although the interlocutory judgment is final as to the right to recover, and interlocutory only as to the amount (3 Black. *Com.* 397), it does not authorise the issue of a writ of inquiry or any other mode of assessment until all the defendants are subject to judgment, and one general assessment can be made. See *Annual Practice*, Order 13, r. 6 (*n*).

Issue of Writ.—The writ of inquiry issues (*a*) on an interlocutory judgment in default to assess the amount of damages recovered, or in *detinue* the value of the goods (see EXECUTION, *Writ of Delivery*); (*b*) to inquire into the truth of breaches suggested after judgment in default of appearance on a bond within 8 & 9 Will. III. c. 11, and to assess the damages (see R. S. C., Order 13, r. 14; 3 & 4 Will. IV. c. 42, s. 16; Mather's *Sheriff Law*, 1894, p. 404; *Annual Practice*, 1898, p. 313); and (*c*) under the Tithe Act, 1836 (6 & 7 Will. IV. c. 71), s. 82, to assess the arrears of tithe rent-charge.

In the case of (*a*) and (*b*) the writ issues without order, on the interlocutory judgment. In the case of (*c*) an order is necessary. Such order is obtained *ex parte* from a Master on an affidavit of facts proving (1) occupation by the person proceeded against; (2) that the tithe rent-charge has been in arrear for more than forty days; and (3) that there is no sufficient distress upon the premises whereon to levy the amount due (see Tithe Act, 1836, s. 82, and *Annual Practice*, Order 36, r. 56 (*n*)).

To whom directed.—In the absence of any order to the contrary, the writ is directed to the sheriff of the county in which the action would have been tried (see Mather's *Sheriff Law*, p. 405; *Annual Practice*, 1898, p. 712). In special circumstances, however, the Court may order it to be executed before a judge of the High Court in London or Middlesex, or before a judge of assize, in which case the judge acts as an assistant to the sheriff, and the latter is required to return the writ (Chitty's *Arch.*, 14th ed., 1333; Tidd's *Prac.* 576). An order for the execution of the writ before a judge is obtained on summons before a Master, and will only be made where a difficult point of law, or question of evidence, is likely to arise (Chitty's *Arch.* 1333). Form of order, Chitty's *Forms*, p. 673.

Forms of Writ.—The Rules of the Supreme Court, 1883, prescribe only

one form of writ of inquiry (App. J, No. 8) which applies solely to assessment of damages on an interlocutory judgment. For form of writ in *detinue* for assessment of the value of chattels and damages for detention, see Mather's *Sheriff Law*, p. 406; Chitty's *Forms*, p. 673. For form of writ to assess the damages where breaches have been suggested after judgment in default in an action on a bond under Order 13, r. 14, see Mather's *Sheriff Law*, p. 405; Chitty's *Forms*, p. 641. For a writ of inquiry under the Tithe Act, 1836, s. 82, the ordinary form (R. S. C., 1883, App. J, No. 8) is used, with variations to meet the requirements of the section named.

Proceedings on the Inquiry.—An inquiry pursuant to a writ of inquiry is subject to Order 36, rr. 14, 15, 19, 34, 35, 36, and 37. For procedure generally, see Mather's *Sheriff Law*, 407–416; and as to evidence on the inquiry, see *ibid.* p. 413, and cases there collected.

Return of the Writ.—The liability of a sheriff to return the writ is the same in the case of a writ of inquiry as in the case of any other writ, and his failure to do so renders him liable to the same penalties (Chitty's *Arch.*, 1338; Mather, 417). The return, with the inquisition annexed, is filed in the Central Office, and, in the absence of any stay of execution by the sheriff in his indorsement of the writ, final judgment may be entered without order for the amount found due. For form of inquisition, see Chitty's *Forms*, 643; Mather, 417.

Assessment under Order in lieu of Writ of Inquiry.—Where "the amount of damages sought to be recovered is substantially a matter of calculation," the plaintiff may apply by summons, under Order 36, r. 57, for a reference to an official referee or a Master. Where there are several defendants, the same rule applies as in the case of a writ of inquiry: there must be only one reference for assessment against all the defendants (*Field* v. *Pooley*, 1842, 3 Man. & G. 756). The words "substantially a matter of calculation" in Order 36, r. 57, are taken from the Common Law Procedure Act, 1852, s. 94. Prior to that Act assessments by the Masters were restricted to matters of pure calculation. For a list of these, see *Holdipp* v. *Otway*, 1681, 2 Wms. Saund. 107 (2), note. Under the Common Law Procedure Act the discretion to refer assessments to the Masters was exercised more freely (see Day's *Common Law Procedure Acts*, 4th ed., 122). These references may now be made either to an official referee or a Master.

Inquisition. — See CORONER; LUNACY; INQUIRY, WRIT OF; SHERIFF.

In re—In the matter of. This phrase is much used in certain legal proceedings, particularly in Chancery and bankruptcy matters, which are not begun by action in the ordinary way, to indicate the particular estate or matter which is the subject of litigation.

In Receipt.—The expression "in receipt of the profits of any land" is used in the Real Property Limitation Act, 1833 (see ss. 3, 7, 8, and 9), in conjunction with the words "in possession of the land," "to denote not the receipt of rent from a tenant, but the receipt of the actual proceeds of the land; and the words were no doubt introduced to prevent any question arising where the owner, although he received the profits, did not actually occupy the land" (Sugden, *Real Property Statutes*, 2nd ed., 47).

In regular turn.—Charter-parties, especially those relating to the coal trade, sometimes provide that the ship is to be loaded or unloaded "in turn" or "in regular turn," and that demurrage or detention shall not be reckoned except from the time of her getting her turn (see DEMURRAGE). What "in turn" or "in regular turn" means in the particular charter-party generally depends on the regulations or practice of the particular port; and evidence of these may be given in order to explain the contract. It makes no difference that such regulations or practice are unknown to the shipowner, for he should know them. Thus where a cargo of coal was sold to the French Government at Algiers, and detention days were "to run from the time of the ship being ready to unload and in turn to deliver," and the French Government, by their regulations there, only discharged one ship at a time, and the ship was consequently delayed, the shipowner, though ignorant of the consequences of the contract made by the charterer, was not allowed to recover for the delay (*Robertson* v. *Jackson*, 1845, 2 C. B. 412). Similarly where a sailing vessel was chartered to go for coal to Whitehaven, and by the charter-party "regular turn was to be allowed the merchant for loading" there, and a delay arose owing to the fact that by the practice of the only colliery at Whitehaven steamers were given precedence over sailing vessels though the latter had arrived before them, and the ship was thus postponed to several steamers which arrived after she did, it was held that the fact of the shipowner being ignorant of this practice was immaterial, and that the ship had been loaded "in regular turn" (*King* v. *Hinde*, 1883, Ir. L. R. 12 C. L. 113). Thus in the case of a ship loading at Newcastle the words "in regular turns of loading" were held to mean "that turn which according to the custom and practice of the place the ship should be entitled to have," and evidence of such practice was admitted (*Leidemann* v. *Schultz*, 1853, 23 L. J. C. P. 17). But if the practice of the port, as regards turns, is not established or known, the charterer who has to load "in regular turn" cannot excuse delay though caused by a practice of the port to give ships their turn by their order of entry in a "turn book," and not by order of readiness (*Lawson* v. *Burness*, 1862, 1 H. & C. 396). And when evidence has been offered to explain "a cargo of coke to be loaded in regular turn" of a custom of the port of Sunderland, by which the shipowner had to wait till a manufacturer of coke, not named in the charter, had supplied all ships entered in his turn book, if his name was given when the contract was made, and he made reasonable despatch, it has been rejected (*Hudson* v. *Clementson*, 1856, 18 C. B. 213).

If by the contract the steamer is to "take her turn with other steamers and receive prompt despatch," and prompt despatch for loading is not given because of a deficiency of cargo, the charterer is liable for the delay (*Elliott* v. *Lord*, 1883, 5 Asp. 63 P. C.); while if the ship loses her turn owing to her not being ready, whether her owner is to blame or not, the charterer is not liable (*Taylor* v. *Clay*, 1846, 9 Q. B. 713). If, however, by the charterer's default the ship misses her turn, and when her next turn comes she is not allowed to make use of it, because of bad weather, he is liable for the whole detention (*Jones* v. *Adamson*, 1876, 1 Ex. 69).

[*Authorities.*—Carver, *Carriage by Sea*, s. 620; Abbott, *Shipping*, 13th ed., 295–297.]

In rem.—This term is derived from the Roman law, but is not used in English law in precisely the same sense as in that law. Indeed, Bracton limits proceedings *in rem* to actions to obtain possession of a *res*, by which

he understood real actions (*de Legg. Ang.* f. 439; Bigelow on *Estoppel*, 42, 43).

The term has in English three distinct meanings: (1) Rights *in rem* are rights existing as against all the world, such as ownership of property or right to personal liberty; (2) proceedings *in rem*; (3) judgments *in rem*. An action *in rem* is a proceeding to determine the right to or disposition of a thing under the control of the Court. It does not necessarily lead to a judgment *in rem*. In the Court of Admiralty as a Court of the civil law, proceedings *in rem* have always been common, and in that Court the *res* means ship, tackle, boats, or cargo, in a sense somewhat similar to that of Roman law (*Minna Craig S.S. Co.* v. *Chartered Mercantile Bank of India and China*, [1897] 1 Q. B. 460; *The Ripon City*, [1897] Prob. 226; *The Mannheim*, [1897] Prob. 13; *The Theodora*, [1897] Prob. 279; *The City of Mecca*, 1881, 6 P. D. 106; Dicey, *Conflict of Laws*, pp. 565, 747). No other action *in rem* is now used in English Courts.

Proceedings by way of foreign attachment or attachment of goods have been described as actions *in rem*; but they are in substance proceedings *in personam* to compel submission and appearance (*Bold Buccleugh*, 1851, 7 Moo. P. C. 267, 282; Dicey, *Conflict of Laws*, p. 427), and the judgment in such proceedings is certainly not a judgment *in rem*.

A judgment *in rem* is a judgment whereby the Court adjudicates upon the title to or the right to the possession of property within the control of the Court, and disposes of the *res*, and not merely of the interest which any person may have therein. If pronounced by a competent Court it is not only internationally valid, but is binding not merely *inter partes* but *inter omnes*, *i.e.* binds all persons whatsoever, whether parties to the proceedings or not (*Castrique* v. *Imrie*, 1870, L. R. 4 H. L. 414). See FOREIGN JUDGMENTS; ESTOPPEL.

Under English law the following kinds of judgments are regarded as to some extent judgments *in rem*:—

(1) Judgments in Admiralty actions *in rem*, such as salvage, collision, bottomry, or forfeiture (*Castrique* v. *Imrie*, 1870, L. R. 4 H. L. 414, 429; *Bold Buccleugh*, 1851, 7 Moo. P. C. 267; cp. *Ballantyne* v. *Mackinnon*, [1896] 2 Q. B. 455).

(2) Sentences in prize causes (*Ballantyne* v. *Mackinnon*, *sup.* at p. 463).

As to (1) and (2) the rule is established beyond controversy (*Stringer* v. *English and Scottish Marine Insur. Co.*, 1869, L. R. 4 Q. B. 676).

(3) Decisions in revenue causes.

(4) Judgments in probate actions, so far as they determine domicile. In *Concha* v. *Concha*, 1886, 11 App. Cas. 541, it was decided that such a judgment is conclusive only as to the validity of the will under English law.

(5) Decisions on questions of personal status, viz.—

(*a*) Divorce; but not decrees in jactitation of marriage (see FOREIGN DIVORCE).

(*b*) Legitimacy (Bracton, *de Legg. Ang.* f. 420). This is now really regulated by the Legitimacy Declaration Act, 1858 (21 & 22 Vict. c. 93); but see sec. 8, and LEGITIMACY.

(*c*) Pedigree.

(*d*) Poor-law settlement. See POOR LAW.

(*e*) Outlawry or attainder (*Co. Litt.* 128 (*a*), 352 (*b*)).

Neither (4) nor (5) have really anything to do with judgments *in rem*. They relate merely to personal status or domicile, and there is no *res* to adjudicate about.

[*Authorities.*—Bigelow on *Estoppel*, 1886; Westlake, *Priv. Int. Law*, 3rd ed., s. 149; Dicey, *Conflict of Laws.*]

Inrolment.—See ENROLMENT.

Insanity.—The *legal* aspects of insanity are discussed in the articles ASYLUMS and LUNACY. For the medical aspects of the subject, in so far as these are of any legal importance, see MEDICAL JURISPRUDENCE.

Insist.—A vendor is not justified in rescinding a contract under a condition of sale which empowers him to do so if the purchaser should within the time limited show any objection, whether of title, conveyance, or otherwise, "and shall insist thereon" if he (the vendor) has not answered the purchaser's requisitions, or made any attempt to do so (*Greaves* v. *Wilson*, 1858, 27 L. J. Ch. 546). See also *Duddell* v. *Simpson*, 1866, L. R. 2 Ch 102, and *Mawson* v. *Fletcher*, 1870, L. R. 10 Eq. 212; *s.c.*, L. R. 6 Ch. 91).

Insolvency—The condition of a person who is unable to pay his debts in full. Prior to the Bankruptcy Act, 1861, insolvent non-traders could only obtain relief and discharge from prison by petition to the Insolvent Debtors Court. All the insolvent's property (with certain exceptions) had to be surrendered, and, in addition, a warrant of attorney had to be executed authorising judgment to be entered up against him for the amount of his unsatisfied debts, upon which execution might at any time be issued on its appearing that he had available assets. The Act of 1861, however, abolished the Insolvent Debtors Court, and extended the law of bankruptcy to non-traders, although it was not till the Bankruptcy Act, 1883, that the acts of bankruptcy (see BANKRUPTCY) were made the same for traders and non-traders alike. Under the Act of 1883, s. 125, the estate of a deceased insolvent may be administered in bankruptcy. See BANKRUPTCY.

Inspection of Documents.—See DISCOVERY; DOCUMENTS; EXHIBITS; INTERROGATORIES.

Inspection of Lights.—By sec. 420 of the Merchant Shipping Act, 1894, a surveyor of ships (see SURVEYOR OF SHIPS) may inspect any ship, British or foreign, for the purpose of ascertaining that it is properly provided with lights and the means of making fog signals, in conformity with the collision regulations. If required by the owner, such surveyor is to be accompanied by some person on behalf of the owner. If the result of this inspection is unsatisfactory, the surveyor is to give notice to the master or owner in writing, pointing out the deficiency, and also what is requisite in order to remedy the same. Such notice is to be communicated to the chief officer of customs at any port where the ship seeks to obtain a clearance or transire, and the ship is to be detained until the defect complained of has been remedied. Power is given to the owner to appeal to the Court of Survey (see SURVEY, COURT OF) for the port or district where the ship is lying against the refusal of a certificate that the supply of lights and fog signals is satisfactory.

For the fees chargeable for such inspection, see the Sixteenth Schedule to the Act.

Inspection of Property.—By Order 50, r. 3 (R. S. C.), the Court or a judge may, upon the application of any party to a cause or matter, make an order for the inspection of any property or thing which is the subject of litigation, and may for that purpose authorise any person to enter upon or into any land or building in the possession of any party before the Court; the provisions of this rule apply to inspection by a jury (r. 5). The judge (r. 4), or a referee (Order 36, r. 48), may also inspect any property or thing concerning which any question has arisen (see these rules annotated in *Annual Practice*).

Inspection of Ships.—By the Merchant Shipping Act, 1894, the Board of Trade is empowered to appoint inspectors to report to them (*a*) upon the nature and causes of any accident or damage to a ship, (*b*) whether the provisions of the statute or any regulations made thereunder have been complied with, or (*c*) whether the hull and machinery of any steamship are sufficient and in good condition (s. 728). An inspector so appointed may board any ship and inspect the same; he may also require such persons as he thinks fit to attend and be examined on oath for the purposes of his report (s. 729). Persons refusing to attend are liable to a fine not exceeding £10, and persons in any way obstructing an inspector are liable to the like penalty (*ibid.* s. 730).

Inspection of ships may likewise be made by surveyors appointed by the Board of Trade (see SURVEYOR OF SHIPS). These surveyors are empowered to go on board any steamship and inspect the same, the machinery, boats, equipment, etc.; and if the ship has sustained any damage, or for any other reason they consider it necessary, they may order her to be taken into dock for the purpose of having the hull surveyed. They are required also to inspect the accommodation provided for seamen on board vessels, to ascertain that it is of the requisite dimensions, and properly ventilated, lighted, and protected from weather and sea (ss. 210, 724–726, and Sixth Schedule).

Emigration officers are also invested with power to inspect emigrant ships (Merchant Shipping Act, 1894, ss. 295, 300, 305).

Medical Inspection.—The medical inspector of ships for a port (an officer appointed by the local Marine Board, or, where there is no such Board, by the Board of Trade, s. 204) is required to inspect the medical stores with which ships may require to be provided, and for this purpose he is invested with the powers of a Board of Trade inspector (see *supra*). He is required to make his inspection at least three clear days before the ship proceeds to sea, if reasonable notice has been given to him; and if the result of his inspection is satisfactory, he cannot make a further examination unless he has reason to suspect that any of the articles inspected have been removed, injured, or destroyed. If the inspection is unsatisfactory, he is required to notify this to the chief officer of customs of the port and to the shipmaster or owner, and the ship is not allowed to sail until a certificate has been produced to such customs officer that the defect has been remedied. A penalty of £20 is imposed for proceeding to sea without the production of such certificate (Merchant Shipping Act, 1894, s. 202). The provisions and water for the crews of ships trading or going from the United Kingdom through the Suez Canal, or round the Cape of Good Hope or Cape Horn, are in like manner to be inspected (s. 206). Medical stores in an emigrant ship are also to be inspected by a medical practitioner appointed by the emigration officer at the port of clearance; and until this inspection

has been made, such ship is not allowed to clear outwards or proceed to sea (s. 300).

Inspector of Mines. — Under the Metalliferous Mines Regulation Acts, 1872 and 1875, and the Coal Mines Regulation Acts, 1887 to 1896, a Secretary of State (in practice the Home Secretary) is empowered to appoint inspectors of mines. Persons who practise, or act in partnership with those practising or acting, as land agents, mining engineers, managers, viewers, agents, or valuers of mines, or arbitrators in differences arising between owners, agents, or managers of mines, or are otherwise employed in or about mines, are disqualified from acting as inspectors under the Metalliferous Mines Acts; and in addition to these persons, the Coal Mines Acts exclude miners' agents and mine-owners.

Inspectors are empowered to enter, inspect, and examine mines at all reasonable times, to ascertain that the provisions of the Acts are complied with; in particular, they are required to see that the ventilation of mines is satisfactory, and, generally, to inquire as to all matters affecting the safety of persons employed in mines; they may also be directed to furnish special reports as to explosions or accidents occurring in mines. If an inspector finds that in any respect, not expressly provided for by the Acts or special rules, a mine is dangerous, he may notify the mine-owner, or agent of the same, and require him to remedy the defect; if this requisition is not forthwith complied with, the inspector is required to report the circumstance to the Secretary of State; but the mine-owner or agent, if he objects to deal with the matter complained of as required by the inspector, may, within twenty days after the receipt of the inspector's notice, appeal to the Secretary of State, whereupon the matter falls to be dealt with by arbitration in the manner provided by the Acts. Failure to comply with the inspector's notice after the time for making an objection has expired, or within the time fixed by the award, where there has been an arbitration which has resulted unfavourably to the mine-owner or agent, is an offence punishable under the Acts. It is also made an offence to obstruct an inspector in the performance of his duty.

Inspectors under the Metalliferous Mines Acts may be directed by the Secretary of State to act under the Coal Mines Acts, and *vice versâ*; those acting under the Metalliferous Mines Acts are also inspectors under the Quarries Act, 1894.

Mine inspectors are required to furnish annual reports, to be laid before Parliament. See MINES AND MINERALS.

Inspectorship, Deed of—A deed entered into between an insolvent trader and his creditors for the gradual liquidation of the debtor's liabilities, either by the carrying on or the winding up of his business under the control and supervision of certain named persons, usually several of the principal creditors, as inspectors. Under such a deed the property of the debtor remains in him, and he is given power to continue to manage the business under a letter of licence (*q.v.*) inserted in the deed, but a covenant is usually put in whereby the debtor obliges himself, if called upon, to execute an assignment of his property, either to the inspectors or to a trustee. The deed generally contains further clauses empowering the inspectors to bring and defend actions, to compound debts, to grant a release to the debtor on the realisation of the estate or payment of the

creditors, as far as that is possible, and to put an end to the inspection if considered advisable in the interests of the creditors. A deed of inspection appears not to be an act of bankruptcy (*In re Spaulman, Ex parte Foley*, 1890, 24 Q. B. D. 728), at least till there has been an assignment by the debtor; the deed, however, requires to be registered under the Deeds of Arrangement Act, 1887 (s. 4, subs. 2 (*c*)). See Lawrance, *Deeds of Arrangement*, 4th ed., ch. iii.; and article BANKRUPTCY, *Private Deeds of Arrangement*, vol. i. p. 528.

Inspeximus (We have inspected)—A word used in ancient charters and letters patent; an exemplification.

Installation—The act of giving a person possession of an office, rank, or order with the customary ceremonies.

Instalment.—A debt which, by agreement between the parties or otherwise, is to be paid in portions at stated times, is said to be payable by instalments. In a bond or agreement it is lawful to stipulate that, on default being made in the payment of any one instalment, the principal sum shall become at once due (*Sterne* v. *Beck*, 1863, 1 De G., J. & S. 595; *Protector Loan Company* v. *Grice*, 1880, 5 Q. B. D. 592; *Ex parte Burden*, 1881, 16 Ch. D. 675).

In the case of a composition deed under which the debtor agrees to pay a composition by instalments, and the creditors suspend their right to sue, a fresh promise is implied to pay the original debt on default being made in payment of the instalments, and the Statute of Limitations does not commence to run until such default has been made (*In re Stock, Ex parte Amos*, [1896] 66 L. J. Q. B. 146; see also *McDonnell* v. *Broderick*, [1896] 2 Ir. R. 136).

Unless otherwise agreed, the buyer of goods is not bound to accept delivery of the same by instalments (Sale of Goods Act, 1893, s. 31 (1)). Where there is a contract for delivery of goods by instalments, which are to be separately paid for, and default is made, either by the seller in delivering or by the buyer in paying an instalment, it is a question to be decided in each case, on the terms of the contract and the surrounding circumstances, whether the breach of contract is a repudiation of the whole contract, or whether it is a severable breach, giving rise only to a claim for compensation (*ibid.* subs. (2)).

Instance Court of Admiralty.—See ADMIRALTY.

Instant.—"Although an instant *est unum indivisibile tempore quod non est tempus nec pars temporis, ad quod tamen partes temporis connectuntur*, and that *instans est finis unius temporis et principium alterius*, yet in consideration of law there is a prioritie of time in an instant"; therefore, although it may be said that, in the case of a devise by one of two joint tenants of land in fee-simple, the devisee and the surviving joint tenant would take at the same instant, yet the surviving joint tenant is preferred before the devisee (*Co. Litt.* 185 *b*).

Instantly.—A coroner's inquisition, which stated that, as the result of an accident on a certain day a person "instantly died," was quashed for not averring with sufficient distinctness the time of the death (*R.* v. *Brownlow*, 1839, 9 L. J. M. C. 15). "The time of death is merely alleged by the word 'instantly.' It was contended that this word, with the context, is equivalent to the word 'then'; but we think it insufficient. '*Instanter*' and '*incontinenter*' are not words implying what is expressed by '*ad tunc*'" (per Lord Denman, C.J., *ibid.*).

"Instantly" occurring in a bill of sale has been read as synonymous with "immediately" (*q.v.*), *i.e.* within a reasonable time (*Massey* v. *Sladen*, 1868, L. R. 4 Ex. 13).

In statu quo.—See STATUS QUO.

Instaurum—A word used in old deeds to signify a stock of cattle.

Instead of.—Although a gift by a codicil "instead of" one given by the will implies some, it does not necessarily mean a total substitution. Thus in *Doe d. Murch* v. *Marchant*, 1843, 6 Man. & G. 813, the words in a codicil "instead of the devise and bequest in the will" were read as meaning "instead of so much only of the devise in the will as is incompatible with the disposition contained in the codicil." See IN LIEU OF.

Institute of International Law—A body of international lawyers consisting of sixty members and sixty associates recruited by election—the members from those who "have rendered services to international law in the domain of theory or practice," and associates from those "whose knowledge may be useful to the Institute." It was formed in 1873 chiefly through the efforts of M. Rolin-Jacquemyns, who had just founded the *Revue de Droit International* (see INTERNATIONAL LAW). In his circular to the leading European writers on international law M. Rolin-Jacquemyns set forth that his object was to create "a permanent or academic body for the study and progress of international law." The official language of the Institute is French, and its annual meetings are held wherever the members at the previous meeting decide to assemble. Thus far they have been held at Ghent, Geneva (twice), the Hague, Zurich, Paris (twice), Brussels (twice), Oxford, Turin, Munich, Heidelberg, Lausanne, Hamburg, Cambridge, Venice, and Copenhagen.

At the present moment all the leading international jurists of the world belong to the Institute. Its mode of operation is to work out the matters it deals with during the intervals between the sessions, in permanent commissions, among which the whole domain of international law is divided up. The commissions, under the direction of their *rapporteurs* or conveners, prepare reports and proposals, which are printed and distributed among the members some time before the plenary sittings at which they are to be discussed. If the members are not agreed, the subject is adjourned to another session, and still another, until they do agree. Thus the resolutions of the Institute have the authority attaching to a mature expression of the views of the leading international jurists of Europe. Sixteen commissions

are at present at work on questions of bankruptcy, the status of vessels and their crews in foreign ports, the position of foreign Governments towards insurrections, the Geneva Convention and maritime warfare, public order and private international law, nationality and vested rights, collisions at sea, the creation of an international jurisdiction in connection with international unions (*q.v.*), such as those for copyright, industrial property (*q.v.*), and postal and telegraphic unions (see INTERNATIONAL UNIONS), double death duties, international measures in relation to stolen securities, etc.

At the present moment the British members are: Sir Sherston Baker, Mr. Thomas Barclay, Prof. Dicey, Mr. J. A. Foote, Prof. Goudy, Sir R. Hart, Prof. Holland, Mr. E. J. Lawrence, Prof. Leech, Lord Reay, Sir John Scott, Sir D. Mackenzie Wallace, and Prof. Westlake.

The labours of each year are chronicled in an *annuaire*, in which are published the final memoirs of the commissions and the essential parts of the discussions at the plenary sittings on the propositions submitted by the commissions. These form a series of sixteen volumes. The present general secretary, Prof. Lehr, has also selected and published in a separate volume, entitled *Tableau Général des travaux de l'Institut de Droit International*, all the resolutions adopted from 1873 to 1892.

Institutes—A legal treatise by Sir Edward Coke in four parts. The first part, which is the most valuable, is a reprint of Littleton's work on *Tenures*, with a commentary (usually cited as Coke upon Littleton, or Co. Lit.); the second part is an exposition of various statutes; the third part is a treatise on criminal law; and the fourth deals with the jurisdiction of the various Courts of law.

Institution.—See SOCIETIES AND INSTITUTIONS.

Instroke—A term used in connection with mining. A right of instroke denotes the right of conveying minerals from a demised mine to the surface through an adjoining mine (Macswinney, *Mines*, 2nd ed., 230). See OUTSTROKE.

Instruct.—See TEACH AND INSTRUCT.

Instruction—A term met with in reports of cases of foreign law. The French equivalent of the English preliminary examination of an accused person before a magistrate. This examination is conducted by a *juge d'instruction*, who has power to cite before him all persons whose evidence may assist him in his inquiry. When the investigation of the case is terminated, the papers are communicated to the *procureur* (public prosecutor), who after examining them presents his charge to the *juge*. The latter thereupon delivers an "ordinance," declaring the prisoner either guilty or not guilty, and if guilty stating whether of a crime, misdemeanour, or petty offence. The accused is then tried in the Court having jurisdiction. If declared by the *juge d'instruction* not guilty, he is forthwith discharged.

The inquiry takes place with closed doors in the *juge d'instruction's* chambers, and in the presence of nobody but the clerk who transcribes the

depositions, and, under a new law of December 8, 1897, inspired by English procedure, of the counsel of the accused.

The word is also used in civil cases to describe the examination of the evidence by the Court between the hearing and judgment.

Instructions—The information given to a counsel or solicitor, to enable him to conduct the client's case in Court. The term is also applied to the directions or orders which an ambassador or other diplomatic agent receives from the Court by which he is accredited, for his own information and direction in his communications with the Government to which he is sent.

Instrument.—In sec. 19 of the Endowed Schools Act, 1869, the words "instrument of foundation" point to written instruments (per Lord Selborne, L.C., in *In re St. Leonard, Shoreditch, Parochial Schools*, 1884, 10 App. Cas. 304, 307).

A power to appoint property "by any deed or deeds, instrument or instruments, or by will," can be exercised by any instrument in writing, whether a deed or not (*Brodrick* v. *Brown*, 1855, 1 Kay & J. 328, 332).

A decree of Court was not an "instrument" within the meaning of sec. 2 of the Apportionment Act, 1834 (*Jodrell* v. *Jodrell*, 1869, 38 L. J. Ch. 507); see now, however, sec. 2 of the Apportionment Act, 1870.

The word "instrument" in the collocation "bond, covenant, or instrument of any kind whatsoever" in the schedule to the Stamp Act, 1891 (which repeats the language of the corresponding schedule to the Stamp Act, 1870), seems to denote something of the same nature as a bond or covenant for the payment of money (per Denman, J., in *Thames Conservators* v. *Commissioners of Inland Revenue*, 1886, 18 Q. B. D. 279, 283).

A telegram is an "instrument" within the meaning of sec. 38 of the Forgery Act, 1861 (*R.* v. *Riley*, [1896] 1 Q. B. 309).

Instrumentality.—Sec. 28 of the Solicitors Act, 1860, provides that in every case in which a solicitor is employed to prosecute or defend any suit in any Court of justice, the Court or judge before whom the suit or matter has been heard may declare such solicitor entitled to a charge upon the property recovered or preserved through his instrumentality. This section was discussed by Kay, J., in *In re Wadsworth*, 1885, 54 L. J. Ch. 640, where he said: "The words of the statute are 'through the instrumentality of such solicitor.' Suppose that a solicitor is employed in a hotly-contested action and prepares the whole case of the plaintiff down to the moment of trial, and that just before the trial the plaintiff changes his solicitor, and then, owing to the exertions of the solicitor formerly employed, he succeeds in the action. Can it possibly be said that that success is not owing to the 'instrumentality' of the discharged solicitor? It seems to me that the fact that he had ceased to be solicitor before the judgment had been delivered is not a good reason why a charging order should not be made in his favour."

Instrument in Writing.—Transfers of shares in a company required by the articles of association to be by "instrument in writing,"

need not be by deed, whatever the practice of the company may have been on the subject (*In re Tahiti Cotton Co., Ex parte Sargent*, 1873, L. R. 17 Eq. 273; see also Palmer, *Company Precedents*, 6th ed., part i. pp. 319, 320).

"When a contract may be made by any species of written instrument, the same strictness is not required as in formal instruments under seal" (per Parke, B., in *Hunter* v. *Parker*, 1840, 7 Mee. & W. 322, at p. 343). In that case, where a shipmaster sold a ship which had been damaged, and the auctioneer who effected the sale transferred it by an instrument under seal, but in other respects complying with the requirements of the Registry Act, 3 & 4 Will. IV. c. 55, s. 31, it was held that, in view of the ratification of the sale by the owner inferred from his acts, this was sufficient; for although the statute did not require a transfer under seal, the instrument might have the effect of a written transfer by the master according to the statute, as well as that of the deed of the auctioneer.

Instrument of Gaming.—A machine intended to assist persons in wagering on a race by enabling them to ascertain the state of bets made on the different horses is an "instrument of gaming" within sec. 3 of the Vagrant Acts Amendment Act, 1873 (*Tollet* v. *Thomas*, 1871, 24 L. T. 508), but money is not (*Watson* v. *Martin*, 1864, 34 L. J. M. C. 50; *Hirst* v. *Molesbury*, 1870, 40 L. J. M. C. 76).

Insufficient.—The word "insufficient," in respect to sureties for costs in sec. 8 of the Parliamentary Election Petitions Act, 1868, "does not mean a general incapacity of entering into a suretyship, but insufficiency for the purposes of the Act" (per Bovill, C.J., in *Pease* v. *Norwood*, 1869, 38 L. J. C. P. 161). In that case it was held that an objection to a recognisance that some of the petitioners signed it as sureties, was an objection to the sufficiency, and not to the validity, of the security, which therefore could be amended by a deposit of money under sec. 9. The judgment of Bovill, C.J., points out when such recognisances are "insufficient" and amendable, and when "invalid" and altogether void.

In sec. 71 of the Railways Clauses Consolidation Act, 1845, "insufficient" means, according to the decision in *Rhondda & Swansea Bay Railway* v. *Talbot*, 1897, 66 L. J. Ch. 570, insufficient for the use of the lands in the condition in which they were when the railway was made.

Insuper—A term used in revenue accounts, signifying to debit. Thus in the Taxes Management Act, 1880, s. 112, the Board of Inland Revenue, in case there is a failure to assess or charge the duties or land tax in any parish, or to make certain returns, or to raise or pay the several sums charged upon any person for the duties or land tax in any parish, may at any time after such failure "set insuper all sums so appearing in arrear, and may return such failure to the High Court by certificate thereof delivered to the Queen's Remembrancer." This certificate is enrolled, and process may be issued thereon against those in default.

Insurable Interest.—See LIFE INSURANCE.

Insurance.—See BURGLARY INSURANCE; FIRE INSURANCE; LIFE INSURANCE; MARINE INSURANCE; LANDLORD AND TENANT.

Intake Measure of Quantity Delivered.—A cargo of deals and battens was shipped under a charter-party by which freight was to be paid on the "intake measure of quantity delivered." Of the pieces of timber (which were all measured by the shipper at the port of shipment) a number were lost during the voyage; the dimensions of these pieces were not known, but they were of average size with the rest of the cargo. It was held that the freight payable was to be ascertained by making in respect of the lost pieces a proportionate deduction from the sum-total of the measurement of the cargo; the words "intake measure of quantity delivered" meaning the quantity actually delivered taken at the measures of the port of shipment (*Spaight* v. *Farnworth*, 1880, 5 Q. B. D. 115).

Intaker—A receiver of stolen goods. The name was specially given to those in the northern parts of England who received the booty brought to them by their confederates, the outputters, from the borders of Scotland. Intakers are mentioned in the statute 9 Hen. v. c. 7.

Intemperance.—A person effecting a life insurance is bound to disclose every material fact within his knowledge, whether he believes such fact to be material or not (*Lindenau* v. *Desborough*, 1828, 3 M. & Ry. 45); and the fact that a person is intemperate in his habits is material, and consequently requires to be disclosed (Bunyon, *Life Insurance*, 3rd ed., 58). Opium-eating is a form of intemperance, and must be disclosed (*ibid.*; *Forbes* v. *Edinburgh Life Assurance Co.*, 10 Court of Session Cases (1st series), 451). But what amount of addiction to intoxicating liquors constitutes intemperance seems to be a question of fact; "in judging of a man's sobriety, his position in life and the habits of the class to which he belongs must, in my opinion, always be taken into account" (per Ld. Watson in *Thomson* v. *Weems*, 1884, 9 App. Cas. 671, at p. 696). In that case a person effected a policy of insurance on his life. In the proposal form were these questions: (*a*) "Are you temperate in your habits? and (*b*) Have you always been strictly so?" to which the person answered (*a*) "Temperate" and (*b*) "Yes." With the proposal was a signed declaration by the assured that his answers to the various questions were true, that the declaration should be the basis of the contract, and that if any untrue statement was made, the policy should be void. It was held that the declaration of the assured was an express warranty that the answers to the questions set out above were true; and as upon the evidence it was shown that the assured was not temperate, the policy was absolutely void. If a policy provides that it shall be void if the assured shall die by reason of intemperance in the use of intoxicating liquor, it must appear that intemperance is the paramount and proximate cause of death (May, *Insurance*, 332). See LIFE INSURANCE.

Intended.—Trustees offered for sale by auction a building estate in flats, according to a plan and particulars and conditions of sale which referred to a deed of mutual covenant which was to be executed by the vendors and each of the purchasers. The deed contained a recital that "it

is intended" not only that the actual purchaser should execute it, but that it should "be a part of all future contracts for sale of the said plots or parcels of land respectively that the several purchasers should execute this deed, and should thereby be severally and respectively bound by all the stipulations hereinafter contained." It was held that by the use of the phrase "it is intended" if the vendors were not bound by a covenant, which however, apparently they were, at all events they were bound by an implied contract restricting their dealing with the land in question in violation of the building scheme (*Mackenzie* v. *Childers*, 1889, 43 Ch. D. 265). See also *Collins* v. *Castle*, 1887, 57 L. J. Ch. 76; *Sheppard* v. *Gilmore*, *ibid.* 6; *Spicer* v. *Martin*, 1888, 58 L. J. Ch. 309.

Intendment.—Intendment of the law is the understanding or intelligence of the law (*Co. Lit.* 78 *b*); that which the law intends or presumes. It is an intendment of law that every man is innocent until proved guilty: that every officer acts in his office with fidelity; that the children of a married woman born during wedlock are the children of her husband. Many things are intended after verdict in order to support a judgment; but intendment cannot support the want of certainty in an indictment (Tomlins, *Law Dict.*).

Intent; Intention.—1. In criminal law, as a general rule, to involve guilt, the accused must have done or omitted something contrary to law, with motive or intent also contrary to law. The mere existence of the intention without commission of the act, or the commission of the act without the intent, does not, as a general rule, constitute crime. This has been dealt with more fully under GUILTY MIND, *ante*, p. 125.

2. In the case of civil wrongs, on the contrary, the general rule is that the motive of the defendant in breaking a contract, or committing a tort, is absolutely immaterial on the question of legal liability. The latest and most authoritative decision on this subject is *Allen* v. *Flood*, 1897, 14 T. L. R. 125; and the following words of Lord Watson (p. 129) sum up the law:—

> Although the rule may be otherwise with regard to crimes, the law of England does not, according to my apprehension, take into account motive as constituting an element of civil wrong. Any invasion of the civil rights of another person is in itself a legal wrong, carrying with it liability to repair its necessary or natural consequences, in so far as these are injurious to the person whose right is infringed, whether the motive which prompted it be good, bad, or indifferent. But the existence of a bad motive, in the case of an act which is not in itself illegal, will not convert that act into a civil wrong, for which reparation is due. A wrongful act, done knowingly and with a view to its injurious consequences, may, in the sense of law, be malicious; but such malice derives its essential character from the circumstance that the act done constitutes a violation of the law. There is a class of cases which have sometimes been referred to as evidencing that a bad motive may be an element in the composition of civil wrong; but in these cases the wrong must have its root in an act which the law generally regards as illegal, but excuses its perpetration, in certain exceptional circumstances, from considerations of public policy. These are well known as cases of privilege, in which the protection which the law gives to an individual who is within the scope of these considerations consists in this, that he may with immunity commit an act which is a legal wrong, and but for his privilege would afford a good cause of action against him; all that is required in order to raise the privilege and entitle him to protection being that he shall act honestly in the discharge of some duty which the law recognises, and shall not be prompted by a desire to injure the person who is affected by his act. Accordingly, in a suit brought by that person, it is necessary for him to prove an intent to injure in

order to destroy the privilege of the defendant. But none of these cases tend to establish that an act which does not amount to a legal wrong, and therefore needs no protection, can have privilege attached to it, and still less that an act in itself lawful is converted into a legal wrong, if it was done from a bad motive. Lord Bowen (at that time Lord Justice Bowen), in the case of *Mogul Steamship Company* v. *M'Gregor*, laid it down that, in order to constitute legal malice, the act done must, apart from bad motive, amount to a violation of law. The learned judge, with his accustomed accuracy and felicity, said (1889, 23 Q. B. D. 612): "We were invited by the plaintiffs' counsel to accept the position from which their argument started, that an action will lie if a man maliciously and wrongfully conducts himself so as to injure another in that other's trade. Obscurity resides in the language used to state this proposition. The terms 'maliciously,' 'wrongfully,' and 'injure' are words which have accurate meanings well known to the law, but which also have a popular and less precise signification, into which it is necessary to see that the argument does not imperceptibly slide. An intent to 'injure' in strictness means more than an intent to harm. It connotes an attempt to do wrongful harm. 'Maliciously,' in like manner, means and implies an intention to do an act which is wrongful to the detriment of another. The term 'wrongful' imports in its term the infringement of some right." The words which I have quoted are in substantial agreement with the language used by Mr. Justice Bayley in *Bromage* v. *Prosser* (1825, 4 Barn. & Cress. 247, at 255), to the effect that, "malice in common acceptation means ill-will against a person, but in its legal sense it means a wrongful act done intentionally, without just cause or excuse." According to the learned judge, in order to constitute legal malice, the act done must be wrongful, which plainly means an illegal act subjecting the doer to responsibility for its consequences, and the intentional doing of that wrongful act will make it a malicious wrong in the sense of law. Whilst it is true that no act in itself lawful requires an excuse, it is equally true that some acts, in themselves illegal, admit of a legal excuse, and it is to these that Mr. Justice Bayley obviously refers. The root of the principle is that, in any legal question, malice depends, not upon the evil motive which influenced the mind of the actor, but upon the illegal character of the act which he contemplated and committed.

3. In dealing with contracts, wills, and other documents, the question of intention is material in several ways. (1) Did the parties mean to execute the particular document? (*Lewis* v. *Clay*, 1897, 14 T. L. R. 149). (2) What did they intend to effect by the document? (3) What is the meaning of the words used?

The first two questions go to the validity of the document, or will, or contract, *i.e.* to settle whether it should be invalidated for fraud, or rectified for mistake. The third deals with construction, and deduces the intentions of the parties from the words used, or from extrinsic evidence in certain cases. This is construction or interpretation, and, as to deeds, is very fully dealt with in Elphinstone on *Interpretation of Deeds*, pp. 37–46. See, too, INTERPRETATION.

In the case of wills, the first question arises on application to prove the will, if the testamentary capacity, or knowledge of the testamentary character, of the instrument set up is in dispute. The second two questions are for the Court of construction, and the rules are given in detail in Williams on *Executors*, 9th ed., 928–940. See, too, LUNACY; WILLS.

In the case of statutes, and statutory rules and by-laws, the intention of Parliament, or the authority making the rule or by-law, must be deduced from the statute without extrinsic aid, and the terms used must be read according to their statutory definition, or ordinary sense according to the case, unless a contrary intention appears from the express terms or context of the statute, etc. See INTERPRETATION.

Interdiction—A word met with in reports of cases involving French and other foreign law, the placing under disability of persons who, though not of unsound mind, are considered disqualified for the management of their property and business affairs (see French Civil Code, arts. 489–512).

Interesse termini.—This is the name given to the inchoate right which the grant of a lease confers before entry upon the lessee (*Co. Lit.* 46 *b*; 2 Bl. *Com.* 144). Such interest is not merely a bare right of action arising out of contract, but a right of property which gives him a cause of action against any person through whose act his entry or the delivery of possession to him may have been prevented (*Gillard* v. *Cheshire Lines Committee*, 1884, 32 W. R. 943). It is the interest conferred, for instance, upon the grantee of a lease which is to take effect only on the operation or sooner determination of a lease already subsisting in the same premises,—the case of what is ordinarily known as a lease in reversion (*Smith* v. *Day*, 1837, 2 Mee. & W. 684). It is not an estate, but a mere right to an estate (*Doe* v. *Walker*, 1826, 5 Barn. & Cress. 111; 29 R. R. 184), and consequently, in accordance with a well-established legal principle, can neither cause nor prevent a merger (*Hyde* v. *Warden*, 1877, 3 Ex. D. 72). The grantee, moreover, of an *interesse termini* cannot of course maintain an action of trespass, that action being founded on possession (*Harrison* v. *Blackburn*, 1864, 17 C. B. N. S. 678). Nor, as it has been held, can he enforce his rights in respect of the covenant for quiet enjoyment, whether express or implied, in the lease, because the aim of that covenant is only to prevent a disturbance of *possession* (*Wallis* v. *Hands*, [1893] 2 Ch. 75). This point, however, cannot be said to be settled, and it certainly appears incorrect to say (per Chitty, J., in last-cited case at p. 85) that no authorities can be produced to show that a person having a mere *interesse termini* can maintain an action on a covenant for quiet enjoyment (see, *e.g.*, *Ludwell* v. *Newman*, 1795, 6 T. R. 458; 3 R. R. 231). The matter, it may be added, is not one of much practical importance, inasmuch as the grantee could maintain an action against his grantor for failing to give him possession (*Coe* v. *Clay*, 1829, 5 Bing. 440; 30 R. R. 699). An *interesse termini* is a right *in rem*, a right alienable at common law, and one which passes to the executor (per Bowen, L.J., in *Gillard* v. *Cheshire Lines Committee*, *supra*).

Interest, Disqualification for.—It is a fundamental maxim of law that a person cannot be judge in a cause in which he is interested. The leading case illustrating this is *Dimes* v. *Grand Junction Canal Co.*, 1852, 3 H. L. 753. There the company filed a bill against the defendant; the case came first before the Vice-Chancellor, who granted the relief, and on appeal to the Lord Chancellor this order was affirmed. It appeared that the Lord Chancellor was a shareholder in the company, and that this was not known to the defendant. It was held that the Lord Chancellor, being interested in the cause, was disqualified from adjudicating upon it; his decree was therefore voidable, and ought to be reversed (see also Viner, *Abr.* "Chancery Law"; *Egerton* v. *Derby*, 1614, 12 Co. Rep. 114; *Brookes* v. *Rivers*, 1660, Hard. 503; *Bridyman* v. *Holt*, 1790, Show. P. C. 111).

The principle embodied in the maxim *nemo debet esse judex in propria sua causa* is applicable to all persons acting in a judicial capacity; and to disqualify a person from acting, it is not necessary that his interest in the subject-matter of the proceedings should be directly pecuniary (*R.* v. *Huggins, Ex parte Clancy*, [1895] 1 Q. B. 563, where a justice who was a member of a small class of privileged pilots was held disqualified from adjudicating in proceedings taken against a person for an infringement of the privileges of such class). The presence of an interested magistrate who takes part in the proceedings is sufficient to vitiate them; it being no answer to

show that there was a majority of the magistrates in favour of the decision without reckoning the interested justice (*R.* v. *Hertfordshire Justices*, 1845, 6 Q. B. 753); but it seems that mere presence on the bench of an interested justice, without word, will not invalidate the proceedings (*R.* v. *London Justices*, 1852, 18 Q. B. 421 n. (*c*)). A justice who has an interest in a case should not, however, occupy a seat on the bench while such case is before the Court. But parties may, if they are cognisant of the fact of interest, consent, either expressly or tacitly, to having their case dealt with by a person who would otherwise be precluded from acting therein (see *R.* v. *Cheltenham Commissioners*, 1841, 1 Q. B. 467; *Johnston* v. *Cheape*, 1817, 5 Dow, 247).

In cases relating to rates, a judge of the High Court is not disqualified from adjudicating by reason of his being one of the ratepayers who will be affected by the rate (40 Vict. c. 11); nor is a justice in matters arising under the Public Health Act, 1875 (s. 258), or in enforcing the laws relating to the rates and taxes of the parish or place in which he is a ratepayer (16 Geo. II. c. 18, s. 1), except in appeals in such cases to Quarter Sessions (*ibid.* s. 3; *R.* v. *Cambridge Recorder*, 1857, 6 El. & Bl. 637).

Under several statutes certain persons are expressly prohibited from adjudicating in particular questions where, by reason of their position, interest might be inferred (see, for example, Licensing Act, 1872, s. 60; Factory Act, 1878, s. 89; Coal Mines Regulation Act, 1887, s. 69; Truck Amendment Act, 1887, s. 15).

A judge is not precluded from taking part in the hearing and decision of a cause in which he acted while at the Bar (*Thellusson* v. *Rendlesham*, 1858, 7 H. L. 429). See also BIAS.

[*Authorities.*—Broom, *Legal Maxims*, 6th ed., pp. 110 *et seq.*; *Magistrates' Annual Practice*, 1897, pp. 13–16.]

Interested Witness.—Prior to the Statute 6 & 7 Vict. c. 85, a person interested in the event of a lawsuit was deemed incompetent to testify as a witness in such action. That Act removed this ground of incompetency, but did not make the parties to the action competent, and it was not till the Statute 14 & 15 Vict. c. 99 was passed that they were admitted as competent witnesses in civil actions. See WITNESS.

Interest in Land.—Sec. 4 of the Statute of Frauds provides that no action shall be brought "upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them," unless there is an agreement or note or memorandum of the transaction in writing, signed by or on behalf of the party to be charged. What is an "interest in land" within this section has been discussed in very many cases. If any general rule is to be gathered from those decisions, it is that given by Sir W. Anson (*Law of Contract*, 8th ed., p. 63), where he states "that contracts which are preliminary to the acquisition of an interest, or such as deal with a remote and inappreciable interest, are outside the section." It has been held that an agreement for the sale of an equity of redemption, debentures charged on all the property of a company, which partly consisted of land and buildings (*Driver* v. *Broad*, [1893] 1 Q. B. 744), shares in a mine (*Boyce* v. *Greene*, 1826, Batt. 608), a grant of the right to take water from a well (*Tyler* v. *Bennett*, 1836, 5 Ad. & E. 377), the letting of

furnished lodgings (*Inman* v. *Stamp*, 1815, 1 Stark. 12), a grant of the right to shoot and take away game (*Webber* v. *Lee*, 1882, 9 Q. B. D. 315), an agreement for the sale of the building materials of a house which is to be taken down and cleared off within a limited time (*Lavery* v. *Pursell*, 1888, 39 Ch. D. 508), must be taken to fall within the section, as relating to "interests in land." On the other hand, contracts for the sale of railway shares (*Bradley* v. *Holdsworth*, 1838, 3 Mee. & W. 422), contracts relating to the investigation of the title to land (*Jeakes* v. *White*, 1851, 6 Ex. 873), an agreement for board and lodging (*Wright* v. *Stavert*, 1860, 2 El. & El. 721, with which, however, cp. *Inman* v. *Stamp*, *supra*), have been decided not to fall within the section. Questions also frequently arose with respect to contracts for the sale of crops; the rule as to which was different according as the contract related to industrial growing crops or natural growing crops. In the case of the former (*fructus industriales*) it was decided that they did not constitute an "interest in land," but that contracts with respect to the sale of the latter (*fructus naturales*), if it was contemplated that the property in the crops should pass before their severance from the soil, did fall within the section, as relating to "interests in lands." Now, by the Sale of Goods Act, 1893, it is expressly provided that "emblements, industrial growing crops, and things attached to or forming part of the land, which are agreed to be severed before sale or under the contract of sale," are included in the term "goods" (s. 62, subs. 1); contracts for the sale of any of these things are now therefore governed by sec. 4 of that statute.

A gift by will of the life-interest in a sum of money to the testator's widow, to be paid out of the proceeds of the sale of his real estate, is a gift of an "interest in land" within sec. 9 of the Dower Act, 1833 (*In re Thomas, Thomas* v. *Howell*, 1886, 34 Ch. D. 166).

The beneficial life-interest of a married woman in a trust fund, properly invested by the trustees upon a mortgage of land, is an "interest in land" within the Fines and Recoveries Act, 1833 (*Miller* v. *Collins*, 1896, 65 L. J. Ch. 353).

Interest of Money.—These words in Sched. D of the Income Tax Act, 1853, are to be read according to their ordinary signification in the English language (per Fry, J., in *Clerical, Medical, and General Life Assurance Society* v. *Carter*, 1889, 22 Q. B. D. 444).

Interest or Charge—"Interests and charges having priority to the settlement" (s. 20, subs. 2 (1) in Settled Land Act, 1882; see *Grainge* v. *Wilberforce*, 1889, 5 T. L. R. 436).

Interest Suit—A suit in the Probate Division in which there is a dispute as to the interest of a person in the estate of the deceased. "Such a suit may arise either as a collateral question in a testamentary cause, in which case it may be tried apart from the main question at issue between the parties, or as an original suit where the right to administration of the effects of an intestate is disputed" (Powles and Oakley, *Probate and Administration*, 3rd ed., 400). Where the plaintiff disputes the interest of the defendant, he must specifically allege in his statement of claim that he does so (Order 20, r. 9, R. S. C.).

Interim Income—The income arising from an estate or fund until the happening of some contingency. In the case of contingent legacies (*q.v.*) the tenant for life is entitled to the interim income of the fund set apart to meet them (*Allhusen* v. *Whittell*, 1867, L. R. 4 Eq. 295). See also TENANT FOR LIFE; REMAINDERMAN; INFANTS.

Interim Order—An order made by the Court to have effect only for a time. Thus the Court or a judge may make an order for the interim preservation or custody of the subject-matter of a disputed contract (Order 50, r. 1, R. S. C.).

Interlineation.—See WILLS.

Interlocutory.—See INJUNCTION; MOTION; ORDERS.

Intermeddle.—It was expressly provided by statute that "no Court whatsoever shall intermeddle with any cause or causes of appeal upon this Act, but they shall be finally determined in the Quarter Sessions": this, however, was held not to exclude the jurisdiction of the High Court to issue a *certiorari* to bring up orders made by justices under the Act (*R.* v. *Morley*, 1760, 2 Burr. 1041). The jurisdiction of the High Court is not taken away except by express words (*ibid.*).

Interment.—See BURIAL; CORPSE.

Supplemental Notes.

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